

# **The Admissibility of Shareholder Claims: Standing, Causes of Action, and Damages**

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This dissertation is submitted for the degree of Doctor of Philosophy

September 2017

To Teté, Simón, Ana, and León.

To Cristina and Gustavo.

# Declaration

This dissertation is the result of my own work and includes nothing which is the outcome of work done in collaboration.

It is not substantially the same as any that I have submitted, or, is being concurrently submitted for a degree or diploma or other qualification at the University of Cambridge or any other University or similar institution. I further state that no substantial part of my dissertation has already been submitted, or is being concurrently submitted for any such degree, diploma or other qualification at the University of Cambridge or any other University or similar institution.

This dissertation, including footnotes, does not exceed the prescribed word limit.

A handwritten signature in blue ink, consisting of a series of loops and a long horizontal stroke, positioned above the printed name.

Gabriel Bottini

10 September 2017

## **Summary**

### **The Admissibility of Shareholder Claims: Standing, Causes of Action, and Damages**

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This thesis addresses risks of multiple recovery, prejudice to legitimate interests of third parties, and inadequate consideration of the applicable law in shareholder claims in investment treaty arbitration. It challenges the application by investment tribunals of two basic premises: i) that shareholders are entitled to claim for damages vis-à-vis measures against the company in which they hold shares and ii) that ‘contract claims’ are to be distinguished from ‘treaty claims’. The central argument is that the failure to recognize substantive overlaps between shareholder treaty claims and contract claims risks more than one recovery, potentially prejudices third parties, and can lead to an incomplete application of the applicable law.

The foundations of standing and the cause of action in shareholder treaty claims involve two complementary ideas of independence, i.e., independence of shareholder treaty rights vis-à-vis the local company’s contractual/national law rights and independence of treaty claims vis-à-vis contract claims. However, the substance of shareholder treaty claims, defined as the state measure and particularly the losses involved, is often identical to or at least overlaps considerably with related contract/national law claims. Prevailing ideas on shareholder standing and the cause of action in international investment law have provided useful conceptual tools for jurisdictional determinations. Yet they have not allowed tribunals and the literature to fully consider the implications of shareholder indirect claims.

The thesis argues, first, that investment tribunals should acknowledge substantive overlaps between contract and treaty claims. Second, shareholder claims may be inadmissible when such overlap exists and there is a risk of double recovery or prejudice to third parties. Third, the substantive coincidence of treaty and contract claims calls for an integrated approach to the applicable law, where proper weight is given not only to IIA provisions but also to general international law and the national law governing the investment.

*With gratitude and admiration:* Michael Waibel, for his superb academic supervision and vital personal support since before I began, Georges Abi-Saab, Raúl Emilio Vinuesa, Philippe Sands, Mónica Pinto, the Faculty of Law of the University of Buenos Aires for always supporting my international endeavours, Veronica Lavista for so much reading and honest feedback, Alejandro Chehtman, Alejandro Turyn, James Crawford, Christine Gray, Roger O’Keefe, Benedict Kingsbury, Hayk Kupelyants, Lesley Dingle, Cameron Miles, María Cecilia Brusa, Jonathan Ketcheson, and Nicolás Grosse.

## Note

An earlier version of part of Chapter 3 was published in Bottini, Gabriel, 'Indirect Shareholder Claims' in Kinnear et. al. (eds.), *Building International Investment Law. The First 50 Years of ICSID* (Alphen aan den Rijn: Kluwer Law International, 2016) 203.

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# 1 *Introduction*

International investment law is a young field with inconsistent decisions on important aspects of jurisdiction and the merits.<sup>1</sup> Yet investment tribunals share two central premises as regards shareholder claims: i) that shareholders are entitled to claim for damages vis-à-vis measures taken against the company<sup>2</sup> in which they hold shares and ii) that ‘contract claims’ differ significantly from ‘treaty claims’. This thesis argues, however, that shareholder and company rights and treaty and contract claims are connected in important ways. Investment tribunals have generally failed to deal with the fact that shareholder rights under national and international law may refer to the same assets and damages. Fundamentally, the thesis posits that shareholder claims under investment treaties for harm to the company’s assets are intertwined with related contract/national law claims, in particular regarding the substance of the claims.

International investment agreements (‘IIAs’)<sup>3</sup> create international law rights and causes of action and provide for the creation of international arbitral tribunals to enforce them. Prevailing theories and most investment tribunals conceptually separate treaty rights and causes of action from the facts to which they apply. Yet however we characterize the additional protection and entitlements IIAs provide, ‘there is only one world’.<sup>4</sup> The underlying realities are all kinds of assets, contracts, property rights, and so on, which are subject to their own legal regimes. The notion that IIA rights and causes of action are largely isolated from such regimes is mistaken. For example, when a contract is protected by an IIA, the rights and causes of action created by the treaty coexist with those arising from the contract. Nowhere do IIAs establish that investment tribunals should disregard the contract. Those other legal regimes protect rights and interests of

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<sup>1</sup> See Franck (2005); Reinisch (2010) 114-117; Park (2015) 443.

<sup>2</sup> The word company is used in this thesis broadly to refer to any legal person of a commercial character recognized by some national law. See Walker (1956) 380; *Diallo* (Jurisdiction) [61].

<sup>3</sup> The most numerous type of IIAs are bilateral investment treaties (‘BITs’). While there may be considerable differences as to structure and scope between BITs and other kinds of IIAs (as well as among BITs), these differences are not always relevant for the present purposes. Thus, unless otherwise stated or evident from the context the acronyms IIAs and BITs are used interchangeably throughout the thesis.

<sup>4</sup> Crawford (2008) 352.

people other than the shareholders bringing IIA claims, even though the assets involved may be the same. If tribunals do not deal appropriately with this overlap, the ‘new source of rights’ created by IIAs risks ‘duplication of claims, proceedings and relief’<sup>5</sup> and connected problems relating to possible harm to third-party interests, inadequate application of the applicable law, and contradictory decisions.

The conceptual foundations of standing and the cause of action in shareholder treaty claims<sup>6</sup> are based on two complementary ideas of independence, i.e., independence of shareholder treaty rights vis-à-vis the local company’s contractual and national law rights,<sup>7</sup> and independence of treaty claims vis-à-vis contract claims.<sup>8</sup> Thus, shareholders’ treaty right to be treated in a fair and equitable way is independent from the company’s contractual rights, not least because the holders of the rights and the applicable law are different. And, relatedly, any contract or national law claim that the company may bring leaves the commencement and prosecution of shareholder treaty claims unaffected. These ideas of independence<sup>9</sup> reflect the current jurisdictional position with respect to shareholder claims. Foreign shareholders hold protected investments (i.e., their shares and often also other assets connected to the company) and therefore enjoy certain rights under IIAs. A breach of treaty provisions protecting these investments ‘will affect a specific right of that protected investor’,<sup>10</sup> which shareholders have standing to directly enforce in international proceedings.<sup>11</sup> Because of this treaty basis, investment tribunals have asserted jurisdiction regardless of any conditions or restrictions stemming from contractual or national law provisions or proceedings.

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<sup>5</sup> Cremades and Cairns (2005) 34.

<sup>6</sup> In the thesis, shareholder treaty claims refers to shareholder claims under IIAs and is used interchangeably with shareholder IIA claims.

<sup>7</sup> *CMS* (Jurisdiction) [68]. Some of the most forceful defenders of diplomatic protection of foreign shareholders questioned, however, the idea of complete independence between the company and its shareholders under international law. See De Visscher (1934) 639-640.

<sup>8</sup> *Bayindir* (Jurisdiction) [166].

<sup>9</sup> The pursuit of autonomy is a recurrent theme in international arbitration. Referring to a preliminary draft of the ICSID Convention, in 1964 Aron Broches, then the World Bank’s General Counsel, observed that ‘[t]he present draft was designed to establish a self-contained system as was found in judicial or arbitral proceedings between States under which there would be no recourse to an outside authority against decisions of tribunals or conciliation commissions’. History ICSID Convention, II-1, 427.

<sup>10</sup> *Sempra* (Jurisdiction) [78]; Schlemmer (2008) 83.

<sup>11</sup> *Gas Natural* [34-35]; *RREEF* (Jurisdiction) [123]. Here, the size of the shareholding is not relevant. See Alexandrov (2005) 28-30; Schlemmer (2008) 83.

However, the substance of shareholder treaty claims, defined here as the state measure or measures and particularly the losses involved,<sup>12</sup> is often identical or at least overlaps considerably with contract/national law claims (actual or potential) by the shareholder itself or by the local subsidiary. As a rule, the source of the main rights in the related claims differs: a treaty in investment arbitration proceedings and a contract in proceedings before national courts.<sup>13</sup> Still, the object of the claims in terms of the damages sought may be identical.<sup>14</sup> In principle, there is no reason why this potential duplication of damages claims should affect the jurisdiction of investment tribunals.<sup>15</sup> Provided the conditions attached to consent to international jurisdiction by the contracting parties to the IIA are present, a tribunal must uphold its competence.<sup>16</sup> But the potential for double recovery<sup>17</sup> and inconsistent decisions arising from parallel treaty and contract claims, among other undesirable consequences, is clear.<sup>18</sup> The thesis argues that decisions on the merits of investment claims have generally failed to discuss substantive similarities between contract/national law and treaty claims or to seriously consider the consequences of any potential overlaps.

## I. SHAREHOLDER TREATY CLAIMS: INDEPENDENCE AND OVERLAP

Shareholder claims under IIAs for measures causing harm to a company in which, directly or indirectly, they hold shares<sup>19</sup> are nowadays a significant part of investment

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<sup>12</sup> To compare the substance of contract and treaty claims, this thesis follows the approach of the *ELSI* case, i.e., to focus on the challenged measure and principally on the losses alleged in each claim. See *ELSI*, 45-46.

<sup>13</sup> Although the distinction between treaty and contract rights depending on the type of instrument where the right is contained is conceptually simple, in certain circumstances ‘maintaining the distinction... can be problematic’. Cremades and Cairns (2005) 14. See also Voss (2011) 160.

<sup>14</sup> Cremades and Cairns (2005) 14.

<sup>15</sup> *Ampal* (Jurisdiction) [329].

<sup>16</sup> The terms ‘jurisdiction’ and ‘competence’ have different meanings under the ICSID Convention, at least in the English and Spanish language versions. Schreuer (2009) 85-86. Unless otherwise stated, however, they are used interchangeably throughout the thesis.

<sup>17</sup> When the thesis refers to the risk of double recovery it includes the risk of multiple recovery, unless otherwise stated.

<sup>18</sup> Wehland (2016) 577. As Brower and Henin note, however, risks of ‘duplicative proceedings, double recovery, and inconsistent awards and decisions’ also derive from ‘[t]he proliferation of international dispute settlement mechanisms’ with ‘[o]verlapping and competing jurisdictions’. Brower and Henin (2015) 54. See also generally Shany (2003).

<sup>19</sup> The thesis refers to this type of claims as indirect claims, regardless of whether the shareholding is direct or indirect. Indirect claims is preferred over other concepts such as ‘derivative claims’ or ‘claims for reflective loss’ mainly because these latter concepts, while perhaps more precise in certain respects, also appear more closely connected to specific domestic legal systems with specific features. ‘Reflective loss’

arbitration.<sup>20</sup> As a jurisdictional matter, investment tribunals have virtually unanimously allowed these claims.<sup>21</sup> The theory behind this accepted position is that, regardless of who the direct addressee of the host state's measures is, as protected investors shareholders exercise their own treaty rights and hold an 'independent right of action' to pursue treaty claims.<sup>22</sup> From the shareholder claimant's perspective, the independence or separation between its international law right of action and that of the local company may have considerable advantages. For example, shareholders can bring such claims irrespective of forum selection clauses or other jurisdiction provisions applicable to local claims or related local proceedings;<sup>23</sup> due to lack of privity and differences in the causes of action, host states may struggle to invoke the local company's contractual and national law obligations applicable to the investment project; and any compensation awarded by the investment tribunal is owed to the shareholder, even if the claim relates to measures adopted against the company.

The thesis argues, however, that there is a substantive interdependence as to the content of contract and treaty claims. Shareholder indirect claims involve the same losses as the ones that may be claimed by the company pursuing non-international claims. Notably, this thesis does not dispute that IIAs directly confer rights on shareholders. Nor does it deny that shareholders are entitled to bring treaty claims based on these rights.<sup>24</sup> Rather, this thesis challenges the orthodox view that shareholder indirect claims are independent vis-à-vis the company's rights and vis-à-vis related contract/national law claims.<sup>25</sup> It analyses overlaps between shareholders' treaty rights and the local company's rights and between contract and treaty claims. It is fundamentally concerned with specific problems deriving from such overlaps, viz. risks of multiple recovery and prejudice to the

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means loss suffered by shareholders 'as a result of injury to "their" company, typically a loss in value of the shares'. Gaukrodger (2013) 11. See also Douglas (2009) 402; Kaufmann-Kohler (2014) 5.

<sup>20</sup> Gaukrodger (2013) 11. For example, of the 53 arbitrations commenced against Argentina at ICSID only 6 did not involve shareholders claiming for harm to assets owned by the local company (including 3 filed by holders of security entitlements over sovereign bonds). See <https://icsid.worldbank.org/en/> (accessed 8 September 2017).

<sup>21</sup> See Chapter 4.

<sup>22</sup> Dolzer and Schreuer (2012) 56-57.

<sup>23</sup> Siwy (2017) 220.

<sup>24</sup> Müller (2015) 39.

<sup>25</sup> Schlemmer argued that in international law 'shareholders have a right to seek protection independent from the corporation'. Schlemmer (2008) 81. To the extent it refers to shareholders' procedural right to bring proceedings autonomously in their own name, the statement is unobjectionable. See also Alexandrov (2005) 27; Müller (2015) 359.

interests of parties not involved in the IIA claim, as well as with connected applicable law problems. It further argues in favour of admissibility as a tool to address these problems, but subject to certain criteria that require that admissibility be applied only in appropriate circumstances. Admissibility is not the ‘magic wand’ to coordinate overlapping contract and treaty rights and claims.<sup>26</sup> Rather, it provides a conceptual framework for investment tribunals to identify and deal with such overlaps. At the same time, it is complementary to other approaches for coordinating related claims, including through a flexible application of the doctrines of *res judicata* and *lis pendens* and through treaty provisions.

#### A Protection of assets under IIAs

By definition, IIAs protect investments. This protection is broad in scope in that the term investment is often defined through a non-exhaustive list of protected assets,<sup>27</sup> which includes concepts as general as ‘business concessions and any other rights required to conduct economic activity and having economic value conferred by law or under a contract’.<sup>28</sup> And IIAs expressly protect both interests and rights, and directly and indirectly (i.e., through intermediary entities) held entitlements over the protected assets.<sup>29</sup> Still, most views acknowledge national law’s relevance to investment protection, at least for purposes of defining property rights under IIAs.<sup>30</sup> Thus, the same asset will typically receive concurrent protection under national and international rules, however the two protections differ and the applicable legal systems combine. This phenomenon is not unique to international investment law.<sup>31</sup> The international law of human rights protects property rights.<sup>32</sup> In principle, the assets in question are also protected by at least

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<sup>26</sup> Crivellaro (2005) 78.

<sup>27</sup> Schefer (2013) 60; Hobér (2014) 333; *Orascom* [372].

<sup>28</sup> Australia-Egypt BIT, Art 1.1(a)(v).

<sup>29</sup> See Schlemmer (2008) 56; Hobér (2014) 343.

<sup>30</sup> Salacuse states that how national law ‘conceives of, defines, and enforces [property and contractual rights] is fundamental [for] an investment project’. Salacuse (2013) 37. See also Schreuer and Reinisch (2002) [12]; Douglas (2003) 198-199; McLachlan, Shore and Weiniger (2017) 379-380; *Tidewater* [116].

<sup>31</sup> Heiskanen argues that IIAs protect only ‘income-producing property’ and are thus, in this respect, ‘narrower in scope than human rights treaties’. Heiskanen (2017) 7. But see *Achmea I* [261] (the concept of ‘investment’ in the applicable BIT was narrower than that of ‘property’ in the EU Charter on Fundamental Rights).

<sup>32</sup> See Universal Declaration of Human Rights, Art 17; European Convention on Human Rights (ECHR), Protocol No. 1, Art 1; American Convention on Human Rights, Art 21; African Charter on Human and Peoples’ Rights, Art 14. See also Reinisch (2008) 416 (under the case-law of the European Court of Human Rights protected ‘possessions’ include ‘shareholder rights’); Heiskanen (2017) 4.



one national legal system (typically that under which the relevant rights were created).<sup>33</sup> Further, a subject of international law may hold rights under both national and international law.<sup>34</sup> The fact that these rights may simultaneously refer to the same asset is not particularly problematic.

Nevertheless, international investment law has three peculiar aspects. First, the idea of internationally protected indirect rights or interests held by investors over assets or rights that may belong to a different person under national law<sup>35</sup> generally does not appear in other areas of international law.<sup>36</sup> This involves not only interaction and possible conflict between national and international rules, but also overlapping rights/interests of different persons over the same assets. The potential for conflicting claims and parallel proceedings is apparent here, not least because most investment tribunals interpret IIAs as conferring protection not only on indirect, but also partial interests over (effectively somebody else's) assets.<sup>37</sup> Second, specifically in the case of shareholders it is argued that in international investment law 'protection is not restricted to ownership in shares; it extends to the assets of the company'.<sup>38</sup> It is also maintained that shareholders have a protected interest in the assets of the company.<sup>39</sup> Third, given IIAs' protection of indirect interests, more than one entity forming a sometimes long corporate chain may be able to claim vis-à-vis the same measure affecting the local company's assets and causing the same damage.<sup>40</sup> Thus, overlapping entitlements may derive not only from national and international law respectively. They may also stem from different IIAs protecting more than one entity at the same or different levels of the corporate chain.<sup>41</sup>

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<sup>33</sup> Dolzer and Schreuer (2012) 64; Salacuse (2013) 37.

<sup>34</sup> *Reparation for Injuries*, 179.

<sup>35</sup> *Servier* [532]; *Azurix (Annulment)* [94]; Müller (2015) 422.

<sup>36</sup> Baumgartner (2016) 48.

<sup>37</sup> *Servier* [532].

<sup>38</sup> Dolzer and Schreuer (2012) 59.

<sup>39</sup> Alexandrov (2005) 45.

<sup>40</sup> See Reinisch (2004) 59; Hobér (2014) 343; Wehland (2016) 580; Baumgartner (2016) 263; Gaillard (2017) 17 (discussing four 'duplicative' IIA arbitrations against Egypt by shareholders at different levels of the corporate chain as well as by the local company).

<sup>41</sup> Bjorklund (2005) 510; *CME (Final Award)* [433].

IIAs create international causes of action potentially for a myriad of legal entities by protecting their interests, even if indirect and/or partial, in assets (no matter who they belong to under national law). In this sense, the concept of investment appears as a particularly broad expression of property.<sup>42</sup> It includes both rights and interests and not only the idea of ownership but also that of control, even with respect to assets that under national law are more generally described, from a legal perspective, as being owned rather than controlled by someone.<sup>43</sup> Thus, under IIAs not only companies but also ‘contractual rights’, ‘tangible property’, and so on are subject to control.<sup>44</sup> The term control appears wide enough to encompass not only ownership rights, but also the ‘exercise of powers or directions’ in respect of assets.<sup>45</sup> The notions of indirect interests or control over assets, plus the idea that shares’ status as protected investments confers enforceable interests over the company’s assets on shareholders, considerably increase the possibilities of coextensive entitlements of different persons over the same assets deriving both from national law and as many IIAs as may be applicable. This potentially multiplies the number of persons with standing to claim.<sup>46</sup> No matter how many additional persons are granted entitlements over an asset, however, the protected asset remains the same. At least under national law the asset generally has a defined owner, who in the case of shareholder indirect claims differs from the party claiming for damage to the asset. And not only the local company as the owner, but also third parties may have protected interests over the asset in question.

## B Problems deriving from concurrent entitlements

This thesis focuses on the phenomenon of concurrent entitlements over the same assets deriving from the protection of rights or interests of shareholders under IIAs, on the one hand, and of the local company under national or contract law, on the other hand. Such

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<sup>42</sup> Lowe (2010) 1020; *Venezuela Holdings (Annulment)* [172]. IIA standards of treatment often provide far-reaching protections, particularly in terms of standing and cause of action (by granting standing to persons with relatively loose connections to the affected asset, whose owner will typically also have a cause of action under national law). Yet in terms of the scope of protection, national law may provide a more ‘comprehensive protection of property rights’ than discrete IIA standards. See *Euram* [402].

<sup>43</sup> See Canada-Trinidad and Tobago BIT, Art I.f.vi (“investment” means any kind of asset owned or controlled either directly, or indirectly through an investor of a third State [including] rights, conferred by law or under contract”).

<sup>44</sup> See Georgia-US BIT, Art I(d).

<sup>45</sup> *Aguas del Tunari* [227]. Douglas observed that the right of ownership is the ‘strongest form of control’ that may be acquired over property. Douglas (2009) 300. See also *Aguas del Tunari* [245].

<sup>46</sup> See *Ampal* (Jurisdiction) [10-15, 328].

protected rights and interests are generally enforceable before some forum and thus constitute a basis for advancing claims.<sup>47</sup> Yet two or more investors may never bring the different claims available and thus a problem of how to coordinate parallel or subsequent related proceedings may or may not arise. However, if a claim by the company is not filed or is partly or wholly discontinued as a result of an IIA claim by one of its shareholders, the company abandons certain rights. This concerns not only the company's position, but may also affect the rights or interests of non-claiming shareholders and other third parties such as the company's creditors. In this sense, the analysis of concurrent entitlements of local companies and shareholders is somewhat different than and is not limited to that of actual parallel or subsequent proceedings—a topic that has already been covered thoroughly in the literature.<sup>48</sup>

Conversely, the study of overlaps between shareholder rights under IIAs and the local company's contract/national law rights is concerned with the relationship between claims before investment tribunals and claims before national courts or arbitral tribunals that are not treaty-based. Of course, the problem of parallel proceedings in international law is broader. The unsystematic creation of international courts and tribunals, which accelerated in recent decades, has engendered increasing possibilities of jurisdictional overlaps between international jurisdictions.<sup>49</sup> Several authors have identified this problem since early on in the development of modern international investment law.<sup>50</sup> Parallel or subsequent proceedings may arise from a variety of situations.<sup>51</sup> The most relevant in the IIA context are different proceedings brought under the jurisdiction provisions of a contract and an IIA or of two or more IIAs but based on the same facts.<sup>52</sup>

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<sup>47</sup> The word claim is used here in a procedural sense as referring to 'the *actual request* of an act or omission based on a specific set of facts, presented against another person in proceedings before a judicial forum'. Wehland (2013) 4.

<sup>48</sup> See generally Shany (2003); McLachlan (2008); Wehland (2013); Salles (2014).

<sup>49</sup> Shany (2003) 7.

<sup>50</sup> See e.g. Ibid, 81; Cremades (2005) 9; Orrego Vicuña (2005) 206.

<sup>51</sup> The International Law Association (ILA) defined parallel proceedings broadly, as proceedings before an arbitral tribunal and 'any other proceedings pending before a national court or another tribunal in which the parties and one or more of the issues are the same or substantially the same as the ones before [the former arbitral tribunal]'. ILA Lis Pendens Report, 26.

<sup>52</sup> Rivkin (2005) 270; Kreindler (2005) 190-191; Hobér (2005) 244. The main interest here is in the relationship between shareholder treaty claims and related contract/national law claims. Yet certain ideas advanced throughout the thesis, including the need to adopt a substantive approach that concentrates on the damages claimed, are also relevant in considering interactions between parallel claims under different IIAs. Where appropriate, aspects of this last issue are also considered.

Risks commonly attributed to parallel proceedings include increased delays and costs, ‘oppressive’ or ‘harassing’ litigation strategies, conflicting results, and multiple compensation.<sup>53</sup> This work concentrates on two problems specifically linked to shareholder claims for damages suffered by the company in which they hold shares: multiple compensation risks and prejudice to parties other than the shareholder claimant. Yet the need to avoid conflicting decisions is also a relevant admissibility consideration. The substantive approach advocated here focuses on the measures and damages involved rather than on formal differences in the causes of action. Thus, conflicting determinations adopted in treaty and contract claims respectively should not be excluded. Nor are such conflicts an ‘unavoidable consequence of a situation where states have extended options to arbitrate not only to the legal entities which have made investments, but also to the ultimate stakeholders in such investment vehicles’.<sup>54</sup> The adoption of conflicting decisions is widely seen as a threat to the effectiveness and the legitimacy of dispute resolution bodies.<sup>55</sup> Investment tribunals should avoid or at least minimize the potential for conflicting decisions wherever possible, not least because there is no indication that states accepted them as a necessary cost in entering into IIAs.<sup>56</sup>

# 1 *Multiple recovery risks*

International law does not allow more than one recovery for the same damage.<sup>57</sup> This concern already featured in *Chorzów Factory*. The case involved a claim by Germany against certain measures adopted by Poland that had resulted in the ownership over a factory and property rights connected to its operation passing to the Polish Treasury.<sup>58</sup> Germany argued that this constituted a measure of ‘liquidation’ not in conformity with

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<sup>53</sup> See Reinisch (2004) 72; Hobér (2005) 242-243; Cremades (2005) 9; Rivkin (2005) 270; Hobér (2014) 250, 343; Brower and Henin (2015) 54.

<sup>54</sup> Söderlund (2005) 319. See also Voss (2011) 331.

<sup>55</sup> Reichert (1992) 239; Shany (2003) 23; Reinisch (2004) 43; Cremades (2005) 10; Rivkin (2005) 270; Gallagher (2006) 329; Voss (2011) 280-281.

<sup>56</sup> Already during the negotiations of the ICSID Convention, several states observed that ‘the possibility of two proceedings regarding the same facts, with the attendant risk of conflicting decisions, was undesirable’. History ICSID Convention, II-1, 577. To a certain extent, Söderlund’s argument about ‘unavoidable consequences’ may be more appropriately applied to increased costs and litigation tactics associated with simultaneous IIA and local proceedings. Söderlund (2005) 319. See also Shany (2003) 259.

<sup>57</sup> *Reparation for Injuries*, 175; ILC Commentaries, 104-105, 109, 124-125; *Pan American* [219]; *EDF (Annulment)* [258] (referring specifically to ‘claims by shareholders for wrongs done to the company’).

<sup>58</sup> *Chorzów Factory* (Jurisdiction), 9-11.

treaty provisions binding both countries.<sup>59</sup> The existence of a breach of international law as regards these facts was *res judicata* due to a prior judgment.<sup>60</sup> The Permanent Court of International Justice ('PCIJ') established the principle of 'full reparation',<sup>61</sup> which entails that 'reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed'.<sup>62</sup> In elaborating the applicable compensation rules, the PCIJ also asserted the need to avoid 'running the risk of the same damage being compensated twice over'<sup>63</sup> and 'awarding double damages'.<sup>64</sup> Thus, both full reparation and the need to avoid double recovery are included as principles of reparation in international law.<sup>65</sup>

Although relevant uncertainties remain as to the bases and permissible scope of shareholder claims under IIAs,<sup>66</sup> it is frequently advanced that such claims may derive from measures affecting the local company's assets.<sup>67</sup> Since the company is entitled to claim against measures harming its own assets, there is clearly the risk of more than one claim for the same damage.<sup>68</sup> And given that, as noted, indirect shareholders may claim for losses suffered by the company's assets, no matter how many intermediary entities separate indirect shareholders from the local company, the risk of overlapping damages claims increases as IIAs protect more shareholders in the corporate structure.<sup>69</sup> Aside from this standing aspect (i.e., the local company and its IIA-protected shareholders being able to claim for the same damage), the problem also has a cause of action dimension. Multiple recovery risks in investment arbitration often involve treaty claims by shareholders, on the one hand, and contract claims (or other national law claims) by the local company, on the other. This difference in the persons and causes of action has

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<sup>59</sup> Ibid.

<sup>60</sup> *Chorzów Factory* (Merits), 29.

<sup>61</sup> ILC Commentaries, 91.

<sup>62</sup> *Chorzów Factory* (Merits), 47.

<sup>63</sup> Ibid, 48.

<sup>64</sup> Ibid, 49. See also *ibid*, 58-59.

<sup>65</sup> ILC Commentaries, 105.

<sup>66</sup> See Chapter 4.

<sup>67</sup> See Alexandrov (2005) 57; Dolzer and Schreuer (2012) 59; Kaufmann-Kohler (2014) 5.

<sup>68</sup> Hobér (2005) 245-246; *Azurix* (Annulment) [109].

<sup>69</sup> McLachlan (2008) 388; Dolzer and Schreuer (2012) 60; Baumgartner (2016) 18.

bolstered ideas of independence of the parallel claims.<sup>70</sup> However, despite treaty claims being generally considered ‘independent’ from contract claims, several investment tribunals have acknowledged that both types of claims may involve the same damages.<sup>71</sup>

## 2 *Prejudice to third parties*

The parties to shareholder indirect claims are a foreign shareholder covered by an IIA and the state where the company affected by the measures is constituted. Thus, the company is a party to the contract in question or owns the relevant assets, but it is generally a third party vis-à-vis IIA claims.<sup>72</sup> The local company is not the only third party with some relationship to the shareholder IIA claim, however. Some investment tribunals have alluded to the possibility that shareholder claims may prejudice ‘other domestic or foreign shareholders, creditors and employees’.<sup>73</sup> The *Urbaser* tribunal mentioned potential conflicts between shareholder IIA claims and the company’s creditors.<sup>74</sup> Yet this conflict was seen as ‘inherent in many investment disputes that also raise, directly or indirectly, a possible option for recovery on the purely domestic level’.<sup>75</sup> These circumstances, however, did not affect the tribunal’s jurisdiction under the applicable IIA.<sup>76</sup>

The potential prejudice to third parties arises because shareholder indirect claims and claims available to the local company involve the same damage. Shareholders may have a stronger interest in advancing IIA claims than other available claims. They may also be able to prevent the local company from initiating or pursuing its own claims. While this may avoid double recovery for the same damage, it negatively affects the company’s position in that it reduces its assets (in the form of a potential claim). This reduction may also affect other stakeholders with actual or potential interests in the company’s assets, including non-claiming shareholders.<sup>77</sup> Employees or creditors may

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<sup>70</sup> See Bentolila (2010) 102.

<sup>71</sup> See e.g. *Sempra* (Jurisdiction) [102]; *Pan American* [219]; *Suez I* (Jurisdiction) [51].

<sup>72</sup> Under certain treaty provisions, the local company directly affected by the measures may have standing to bring IIA claims despite having the nationality of the host state. See e.g. ICSID Convention, Art 25(2)(b), second sentence. Under the definition adopted here, such claims are not indirect claims.

<sup>73</sup> *Pan American* [220].

<sup>74</sup> *Urbaser* (Jurisdiction) [253].

<sup>75</sup> *Ibid.* See also D’Agostino (2012) 204.

<sup>76</sup> *Urbaser* (Jurisdiction) [253]. See also *Pan American* [220]. Shany includes the protection of third parties among the criteria to distinguish between ‘legitimate and illegitimate forum shopping’. Shany (2003) 145.

<sup>77</sup> Wehland (2013) 8-9.

see the prospect of successfully bringing claims against the company diminished or even wiped out, depending on how important the claim not pursued was for the company's wherewithal. As to cases where the company does pursue its claims, investment tribunals confronted with parallel local proceedings have suggested that the later-in-time tribunal may take into account whatever compensation has already been granted to avoid double recovery.<sup>78</sup> Yet assuming a local court is willing and able as a matter of national law to factor in compensation previously received by the shareholder, the implication is that the local court should reduce the compensation to which the company is entitled. Here again, the upshot prejudices both the company and other third parties related to it.<sup>79</sup>

## II. ADDRESSING SUBSTANTIVE OVERLAPS

Certain consequences of overlaps in the damages claimed in investment arbitration are inconsistent with important legal principles, including the one prohibiting double recovery, and otherwise undesirable for the correct functioning of dispute resolution mechanisms. However, it is not clear that they affect the jurisdiction of investment tribunals as such. Acknowledging these implications does not necessitate denying that states have, through IIAs, consented to investment tribunals' competence over shareholder indirect claims. And the existence of consent is the definitive jurisdictional inquiry.<sup>80</sup> Nor do such potential problems directly concern, at least as a matter of principle, the ultimate merits of investment claims, viz. whether IIA standards of treatment have been breached, or to what extent losses have been proved and may be linked to a specific treaty breach.<sup>81</sup> What then are the tools available to investment tribunals to deal with these risks?

### A The admissibility approach

Shareholders' ability to bring investment claims for damages suffered by the local company is premised on the status of shares as a protected investment and IIAs protection of indirect interests over assets. However, the position under general international law, as

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<sup>78</sup> See e.g. *Lauder* [172]; *CME* (Final Award) [489].

<sup>79</sup> To the extent shareholders perceive investment tribunals as more favourable and the proposed solution is simply that the subsequent tribunal factors in the first-in-time decision, the result may be a 'race to judgment' to the prejudice of national courts. The 'race to judgment' phenomenon is widely regarded as an undesirable byproduct of parallel litigation. See Reichert (1992) 239; Shany (2003) 156; Orrego Vicuña (2005) 211-212.

<sup>80</sup> See Walters (2012) 659-660; Chapter 2.

<sup>81</sup> However, as discussed below, admissibility decisions may be intertwined with damages considerations.

the International Court of Justice ('ICJ') confirmed in *Diallo*, is that shareholders cannot claim for damages suffered by the company.<sup>82</sup> Thus, allowing shareholder indirect claims requires concluding that IIAs grant shareholders rights different from those that they derive from general international law. Investment tribunals have unanimously found that IIAs do precisely that,<sup>83</sup> not least through provisions that define the protected investments broadly.<sup>84</sup> The thesis does not deny that investment tribunals may have jurisdiction over shareholder indirect claims,<sup>85</sup> although this ultimately depends on the construction of the applicable treaty provisions.<sup>86</sup> Rather, it is concerned with the exercise of jurisdiction over such claims when it results in claim duplication or prejudice to parties not involved in the IIA arbitration.

Admissibility consists in a 'legal reason' not to hear or not to decide the ultimate merits of a claim, separate from the question of whether there is jurisdiction.<sup>87</sup> The thesis' central concern is that, notwithstanding differences in the parties and causes of action, shareholder indirect claims under IIAs involve the same damages as related contract/national law claims. The argument is that some of the main consequences of this overlap, while not affecting jurisdiction as such, may constitute grounds for a tribunal not to make a finding on the merits of one or more specific claims.<sup>88</sup> Here the legal reason preventing a determination of the ultimate merits, either temporarily or permanently, is not the absence of consent but rather the effects of the full exercise of jurisdiction over a certain claim. It is thus 'more naturally considered as a matter of admissibility than jurisdiction'.<sup>89</sup> The problem requires assessing whether the shareholder IIA claim involves the same damages that may be invoked in other kinds of claims and, if so, what the consequences of granting the claim may be on the respondent and third parties

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<sup>82</sup> *Diallo* (Jurisdiction) [61]; Cohen Smutny (2009) 364, 369.

<sup>83</sup> See Chapter 4. See also e.g. *Camuzzi II* (Jurisdiction) [44]. But see *Consortio*, § II [37(iv)].

<sup>84</sup> Vandevelde explained that in the practice of the United States ('US') the reference to indirectly owned or controlled investments 'makes clear that the BITs do not distinguish between investment owned and controlled directly and that owned or controlled through corporate tiers'. Vandevelde (1992) 45–6. See also Douglas (2009) 310.

<sup>85</sup> However, jurisdiction over indirect claims is not established only because shareholders have a direct right of action and shares as such are a protected investment, but through IIA substantive provisions granting shareholders rights over the company's assets. See Müller (2015) 428–431.

<sup>86</sup> Cohen Smutny (2009) 376; Valasek and Dumberry (2011) 70; *Azurix* (Annulment) [81].

<sup>87</sup> *Nicaragua v Colombia* (2016) [48]; *Venezuela Holdings* (Annulment) [110].

<sup>88</sup> See Walters (2012) 660–661.

<sup>89</sup> *SGS v Philippines* [154].



(including the local company). Further, this assessment must be balanced against potentially conflicting considerations, including investment tribunals' duty to exercise the jurisdiction they possess.<sup>90</sup>

Two related objections may be raised against how this thesis proposes to use admissibility. First, by finding a shareholder indirect claim inadmissible, an investment tribunal could under some IIA provisions fail to give effect to shareholders' right to claim for harm to the company's assets. Second, against the backdrop of this right, an inadmissibility finding entails the tribunal not exercising its jurisdiction. It denies shareholders the benefit of IIAs' 'most essential provision', i.e. the arbitration clause,<sup>91</sup> and should thus only be resorted to in extreme circumstances. With respect to the first objection, IIA provisions grant investors certain protections; the effect of these provisions is

to create an enforceable right to damages via international arbitration in the event that investors can prove breaches of a few, basic and long-established international standards for the treatment of foreign investment.<sup>92</sup>

Shareholders have an international cause of action to be compensated if their IIA protected rights or interests are affected,<sup>93</sup> including through measures against the company's assets.<sup>94</sup> Such cause of action is not affected by any exercise by the local company of its national law rights.<sup>95</sup> If an investment tribunal deems inadmissible a shareholder claim over which it has jurisdiction without deciding the claim's ultimate merits, it fails to enforce shareholders' treaty rights and thus to apply the law.

However, admissibility means that even if the arbitral tribunal has jurisdiction and the facts argued by the claimant are correct, there are nonetheless reasons why the tribunal should not examine or at least not determine the merits.<sup>96</sup> Thus, neither the existence of

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<sup>90</sup> See e.g. *Tokios Tokelès* (Jurisdiction) [36]. However, an admissibility decision does involve an exercise of jurisdiction. See Douglas (2009) 54, 141; Chapter 2. Further, in the admissibility determinations relevant here the tribunal's analysis of the claims may have to be extensive. See Lee (2001) 2688; De Brabandere (2012) 635.

<sup>91</sup> *Eastern Sugar* (Partial Award) [165-166].

<sup>92</sup> Crawford (2004) [41]. See also Gallagher (2006) 350.

<sup>93</sup> Braun (2011) 115; ILA Res Judicata Final Report [36].

<sup>94</sup> Alexandrov (2005) 45; Cohen Smutny (2009) 373.

<sup>95</sup> Alexandrov (2005) 32; Bentolila (2010) 108, 129-130; *Azurix* (Annulment) [107-109].

<sup>96</sup> *Oil Platforms* (Merits) [29]; Thirlway (2000) 74; Baumgartner (2016) 304.

jurisdiction nor the merits of the claimant's case (including whether it holds the rights invoked) preclude a finding of inadmissibility. There must be legal grounds in international law that justify the application of admissibility. Although these grounds may raise substantive issues, they are different from the ultimate merits of the case.<sup>97</sup> The admissibility grounds advanced here involve an application of principles of international law, not least the one prohibiting double recovery.<sup>98</sup> Admittedly, when a tribunal finds a shareholder claim inadmissible the rights invoked are not enforced in the proceedings in question (which does not prevent the shareholder from being compensated through another proceeding or, as discussed below, from pursuing its IIA claim again in certain cases). But this is a function of recognized doctrines of international law,<sup>99</sup> which is part of the law applicable in investment treaty arbitration.<sup>100</sup> Further, while in principle shareholders, as protected investors, do have a right to be compensated if they suffer a treaty breach, they do not have an enforceable right to be compensated twice for the same harm.<sup>101</sup>

Secondly, finding a claim inadmissible may be described as the 'most-far-reaching measure' a competent arbitral tribunal may adopt,<sup>102</sup> which may deny shareholders their ability to have their treaty rights finally determined. Yet, first, this thesis advances admissibility only in cases where important legal principles are affected. And prominent among the proposed admissibility criteria is the existence of an available forum where the overlapping claims may effectively be heard.<sup>103</sup> Second, as certain arbitral decisions show,<sup>104</sup> admissibility determinations, including those dealing with

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<sup>97</sup> Fitzmaurice (1958) 12; Rosenne (2012) [2]; De Brabandere (2012) 613-614.

<sup>98</sup> Instances of application of admissibility in investment arbitration include cases where the claimant was relying 'on a contract as the basis of its claim when the contract itself refer[red] that claim exclusively to another forum' or was advancing certain claims under the IIA that had been waived in the relevant contract. See *SGS v Philippines* [154]; *Hochtief* (Liability) [187-194].

<sup>99</sup> Aside from admissibility, other recognized defenses in international law, such as 'abuse of process, estoppel and waiver', may have the effect that an otherwise valid claim cannot 'be relied upon or enforced by the holder of that right'. *Chevron* (Interim Award 2008) [137].

<sup>100</sup> See Chapter 7.

<sup>101</sup> See *Orascom* [542] (IIA's protection of indirect investments does not mean that the host state has accepted it can be sued multiple times for the same harm).

<sup>102</sup> Hobér (2014) 249.

<sup>103</sup> See Chapter 2.

<sup>104</sup> *SGS v Philippines* [163-177]; *Bureau Veritas II* [294].

complexities relating to parallel proceedings, may include a stay of the arbitration.<sup>105</sup> Here, the shareholder's day before the investment tribunal is preserved.<sup>106</sup> Third, even if the admissibility decision is in the form of an award that puts an end to the arbitration, the shareholder may be able to subsequently pursue its treaty claim.

In principle, an inadmissibility decision would not constitute *res judicata* preventing the shareholder from bringing a new arbitration.<sup>107</sup> Thus, if for instance the finding of inadmissibility was premised on the availability of an alternative forum and it turned out that such forum was unavailable, the shareholder could then bring fresh treaty proceedings.<sup>108</sup> Depending on the facts of the case, the same solution could apply if the shareholder claim was found inadmissible due to a risk of double recovery deriving from a parallel claim by the company and recovery by the latter does not eventuate. Moreover, in similar circumstances, subject to the requirements of the relevant arbitral rules, the shareholder may be able to seek a revision of the award finding its claim inadmissible. For example, the discovery, after the award was rendered, that no adequate alternative forum is available for the company to be compensated may constitute a 'fact of such a nature as decisively to affect the award'.<sup>109</sup> When justified, a revision may involve a 'substantive alteration' of the award.<sup>110</sup>

## B Other possible approaches

One fundamental goal of the thesis is to debunk ideas of independence of shareholder treaty claims from related contractual claims. The problem is not just conceptual: aside from a possible inadequate application of the applicable law, if substantive overlaps are not acknowledged because of a supposed independence, the risk is that their consequences may simply be ignored.<sup>111</sup> The argument has a standing aspect, i.e., whether shareholder

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<sup>105</sup> Reichert (1992) 250; Douglas (2009) 370-371; Hobér (2014) 252; *SPP* (Jurisdiction I) [84]. But see Kreindler (2005) 193.

<sup>106</sup> Douglas (2009) 388; McLachlan (2008) 467. Although the admissibility decisions relevant here would typically be preceded by consideration and probably a hearing of the shareholder claims' substance.

<sup>107</sup> Amerasinghe (1990) 354; Walters (2012) 661; De Brabandere (2012) 617; Kotuby and Egerton-Vernon (2015) 490; Baumgartner (2016) 301; *SGS v Philippines* [171].

<sup>108</sup> See *Waste Management II* (Preliminary Objection) [36, 43]; *RREEF* (Jurisdiction) [225]. See also *SPP* (Jurisdiction I) [83] (referring to 'a tribunal declining jurisdiction on the assumption, which later proves invalid, that another tribunal was the competent one to deal with the case')

<sup>109</sup> See, e.g., ICSID Convention, Art 51 (1).

<sup>110</sup> Schreuer (2009) 879.

<sup>111</sup> The tribunal in *Saur* denied possible prejudices to third parties resulting from the compensation going to the shareholders rather than to the company. This could not be accepted because of the contractual nature

treaty rights are independent from the company's 'non-international' rights, and a cause of action aspect, i.e., whether treaty claims are independent from contract claims.<sup>112</sup> Since the focus is on substantive interrelationships between claims and not on whether conditions attached to consent to jurisdiction are present, admissibility provides a framework to apply some of the relevant legal principles. However, other ways to tackle the problems presented by overlaps between shareholder treaty claims and contract/national law claims are sometimes available. Yet even in cases where there are other possible approaches, as discussed below, admissibility often has advantages over the alternatives—viz. deferring the consideration of the effects of overlaps to the damages phase and the application of legal principles or treaty provisions on coordination of parallel claims.

# 1 *Confronting the problem at the quantum phase*

Arbitral decisions have sometimes identified potential problems linked to shareholder IIA claims, especially double recovery. They were often preliminary decisions denying that such consequences could affect jurisdiction and stating that, if necessary, they could be dealt with when addressing the merits or damages.<sup>113</sup> Investment tribunals have further affirmed that there are 'numerous mechanisms' or 'ample legal tools' to prevent double recovery.<sup>114</sup> The solution, however, has frequently been limited to the already noted expectation that someone else, either a court or a regulator, would later somehow take into account the compensation granted to the shareholder.<sup>115</sup> Others have suggested that although 'the same damage to the same assets' may be involved, the shareholder is 'entitled to be compensated to the extent of its own loss'<sup>116</sup> or only for the 'losses suffered

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of the claims the local company may bring—which are subject to national law—and the treaty nature of shareholder IIA claims. *Saur* (Jurisdiction) [91-92]. But see *Gemplus*, § 60 (despite shareholder treaty claims and the company's national law claims being 'jurisdictionally distinct and wholly separate', tribunal appreciating 'the concern that, in practical terms, [shareholders] may be seen as recovering compensation for the same acts through separate sets of proceedings').

<sup>112</sup> The point here is not simply that investment treaty tribunals should leave contract claims to the contractual forum. Rather, it is to consider to what extent losses that are being claimed in the treaty claim are the same as losses that may be claimed under the contract and, if so, how to deal with such overlap.

<sup>113</sup> See *Sempra* (Jurisdiction) [102]; *Camuzzi I* (Jurisdiction) [91]; *Suez I* (Jurisdiction) [51]; *Suez II* (Jurisdiction) [51]; *Pan American* [219]; *Hochtief* (Jurisdiction) [122]; *Urbaser* (Jurisdiction) [253]; *RREEF* (Jurisdiction) [126].

<sup>114</sup> *Camuzzi I* (Jurisdiction) [91]; *Daimler* [155].

<sup>115</sup> Gaukrodger (2013) 35. Referring to this solution, Douglas observed that '[t]he common refrain is no more sophisticated than "it is not our problem"'. Douglas (2009) 455.

<sup>116</sup> *Azurix* (Annulment) [109].

in their personal capacity as shareholders'.<sup>117</sup> It has also been argued that reducing the company's compensation due to the reparation received by the shareholder would affect the company's and its creditors' rights.<sup>118</sup> But given that 'treaty rights are additional and independent of domestic rights', the responsible state 'should pay twice'.<sup>119</sup>

On the one hand, however, the complexities involved in trying to reduce the compensation to which someone is entitled due to a previous payment under a different legal system (and often to a different claimant) should not be underestimated.<sup>120</sup> On the other hand, if not to 'offend against basic principles' prohibiting double recovery one is able to deduct the compensation obtained by the shareholder IIA claimant from the company's entitlement, the result is that such shareholder is overcompensated and the rest undercompensated.<sup>121</sup> And the effect on other third parties of reducing the compensation owed to the company must still be considered. Further, the contract involved in the shareholder claim may have to be renegotiated between the host state and the company considering the contested measure. Both the investment arbitration and the local renegotiation may seek to address the measure's effects. It may not be feasible for the parties to the contract to factor into the renegotiations any compensation obtained by a shareholder<sup>122</sup> without, for example, affecting other shareholders or the company's operations.

Investment tribunals have also in certain cases provided for the aggrieved investor (or even the local company) to relinquish its rights and claims over the investment or transfer it to the host state upon payment of compensation.<sup>123</sup> The terms of these transactions varied in each case and their purpose was often not expressly stated. Still,

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<sup>117</sup> Zuleta, Saldarriaga and Vohryzek-Griest (2010) 1231-1232.

<sup>118</sup> Bentolila (2010) 138.

<sup>119</sup> Ibid.

<sup>120</sup> Wehland (2013) 8-9. Despite allusions to this possibility in arbitral decisions, the present author is not aware of any local court decision that has taken into account a compensation previously granted in an investment arbitration in specifying the compensation owed to the local claimant.

<sup>121</sup> Ferran (2001) 245-247.

<sup>122</sup> In *Sempra*, the tribunal noted that renegotiation agreements between Argentina and local companies 'expressly envisage[d] that the Respondent [would] be kept free of any adverse consequences arising from compensation that the Claimant might obtain in this arbitration or other proceedings'. *Sempra* (Award) [396]. Yet Argentina has since settled arbitral awards granting compensation for failure to increase the tariffs of certain public utilities and has granted tariff increases to the same public utilities. No provision has been adopted to address possible overlaps. See Resolutions 598/2013 (approving draft settlement agreement) and 3723/2016 (granting tariff increases to the public utility involved in the *CMS* case).

<sup>123</sup> See *SPP* (Award) [173]; *AAPL* [111]; *Santa Elena* [111(5)]; *Metalclad* [127]; *CMS* (Award) [469].

one of the goals appears to have been to address multiple recovery problems connected to the shareholder being fully compensated and at the same time retaining an interest over the investment.<sup>124</sup> Here double compensation may arise when, after the shareholder has been compensated through the IIA claim, the company is then fully compensated for the effects of the same measure (thus also indirectly benefitting the shareholder proportionally to its shareholding).<sup>125</sup> In this context, doubts have been noted as to investment tribunals' jurisdiction to require the investor to transfer its investment as a condition to receive compensation.<sup>126</sup> The shareholder may want to retain its investment, however damaged, and also be compensated for the losses caused by the measure.<sup>127</sup>

Despite the complexities of the proposed solutions,<sup>128</sup> IIAs do not derogate from the international law rule prohibiting double recovery.<sup>129</sup> The rule has been consistently recognized both by investment tribunals in the IIA context and by other international tribunals.<sup>130</sup> Further, the caveat that the shareholder may be compensated for the same damage but only for 'its own loss' is far from being the solution. First, no one suggests that the shareholder would receive more than the share of the compensation corresponding to its shareholding<sup>131</sup> after certain necessary deductions are made (essentially related to the company's debt). But if the damage is the same and both the shareholder as claimant in an IIA arbitration and the company are compensated, the result is double recovery by the former.<sup>132</sup> Conversely, if only the shareholder is compensated the consequence is the negative effect noted above on the company and possibly also on other third parties. Second, to the extent the idea of losses suffered by shareholders 'in

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<sup>124</sup> Rubins (2003) 489.

<sup>125</sup> Gaukrodger (2013) 36; Müller (2015) 83.

<sup>126</sup> Douglas (2009) 440-441; Gaukrodger (2013) 35.

<sup>127</sup> Rubins (2003) 482. Rubins argued that this may make sense from a practical point of view. In cases of indirect expropriation, the state will generally have no intention to retain title over the investment and will 'normally be ill-equipped to take over the damaged company's day-to-day operations and restore it to health'. Ibid, 488-489.

<sup>128</sup> See Hobér (2005) 246.

<sup>129</sup> An 'important principle of customary international law should [not] be held to have been tacitly dispensed with, in the absence of any words making clear an intention to do so' (see *ELSI* [50]), which is the case of IIAs. IIAs sometimes contain provisions specifically designed to prevent double recovery. See Lee (2001) 2680 (referring to Article 1121 of the North American Free Trade Agreement (NAFTA)).

<sup>130</sup> See e.g. *Panamerican* [219]; *Suez I* (Jurisdiction) [51]. On mixed claims commissions recognizing the principle see Chapter 3.

<sup>131</sup> Müller (2015) 208.

<sup>132</sup> Kaufmann-Kohler (2014) 7.

their personal capacity’<sup>133</sup> refers to a reduction in the share value as a result of the state measure affecting the company, the damage involved is still the same.<sup>134</sup>

Double recovery and prejudice to third party interests may be described generally as damages considerations. But whether they are treated as potential admissibility grounds or as affecting only the quantum of compensation depends on whether they may preclude the treatment or at least a finding on the ultimate merits of a claim.<sup>135</sup> For example, the *Hochtief* tribunal, after adopting a first decision affirming jurisdiction over claims concerning a concession held by the local company,<sup>136</sup> considered in the liability decision an objection to the admissibility of parts of the treaty claims the claimant had advanced as a company creditor (as opposed to those advanced as shareholder).<sup>137</sup> The tribunal upheld the objection based on a contractual provision which excluded ‘any claim’ by lenders to the project.<sup>138</sup> Arguably, the tribunal could have addressed the effect of matters related to claims of the local company (here, a waiver of certain contract claims) over the treaty claims at the quantum phase. However, the tribunal’s admissibility decision not only avoided a full discussion and a decision on the merits and damages aspects of the claims in question, which is important from a procedural economy point of view. It also avoided incidentally deciding the contractual aspects involved in the treaty claim found inadmissible, which were also before the contractual forum (thus avoiding not only risks of double recovery but also of contradictory decisions).<sup>139</sup>

## 2 *Coordination of parallel claims*

As noted above, the problem of duplication in the damages claimed in treaty and contract claims is related but not coterminous with that of parallel proceedings in international investment law (let alone in general international law). Further, one of the two main concerns identified here, the risk of double recovery, is relevant when considering the consequences of parallel proceedings. However, preventing this risk does not, as such,

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<sup>133</sup> Of course, shareholders may have claims based on their rights *qua* shareholders (such as to collect dividends). But those claims are not indirect claims. See Chapter 4.

<sup>134</sup> See Chapter 5.

<sup>135</sup> For a detailed analysis of the damages claimed leading to a finding of inadmissibility see *Orascom* [498-518].

<sup>136</sup> *Hochtief* (Jurisdiction) [4, 117, 125].

<sup>137</sup> *Hochtief* (Liability) [187].

<sup>138</sup> *Ibid* [188-194].

<sup>139</sup> See *Hochtief* (Award) [40, 55].

necessarily mean preventing a party from bringing more than one claim for the same damage.<sup>140</sup> That said, legal devices to coordinate parallel or subsequent related proceedings are briefly considered, i.e., *res judicata* and *lis pendens*, and treaty provisions, such as fork in the road clauses and provisions on consolidation or waiver of related proceedings.<sup>141</sup>

(a) *Res judicata* and *lis pendens*

The *res judicata* principle is a general principle of law, as well as a principle of international law, according to which decisions of international tribunals ‘are not only binding on the parties, but are final, in the sense that they cannot be reopened by the parties as regards the issues that have been determined, save by procedures, of an exceptional nature, specially laid down for that purpose’.<sup>142</sup> This final and binding nature protects the defendant from double jeopardy and promotes judicial economy and legal security.<sup>143</sup> The litispendence doctrine (*lis pendens* or *lis alibi pendens*) prevents a party who is already involved in legal proceedings from starting new proceedings involving the same parties and the same dispute.<sup>144</sup> As to the requirements for the application of these principles,

there are four preconditions for the doctrine of *res judicata* to apply in international law, namely proceedings must: (i) have been conducted before courts or tribunals in the international legal order; (ii) involve the same relief; (iii) involve the same grounds; and (iv) be between the same parties.<sup>145</sup>

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<sup>140</sup> See *SPP* (Jurisdiction I) [61]; *Euram* [230]. There may be valid reasons for a party to pursue multiple remedies. Shany (2003) 144; Hobér (2005) 242.

<sup>141</sup> Shany describes the rules of *lis alibi pendens*, *res judicata*, and *electa una via* (or fork-in-the-road) as ‘jurisdictional competition regulating rules’. Shany (2003) 21-22. Detailed discussion of these mechanisms is beyond the scope of this thesis.

<sup>142</sup> *Application Genocide Convention I* [115]. See also Ralston (1926) 48-51; Cheng (1953) 337; Lauterpacht (1958) 325-326; McLachlan (2008) 217-218; Magnaye and Reinisch (2016) 265-266; *Waste Management II* (Preliminary Objection) [39-40]; *Apotex II* [7.11-7.12].

<sup>143</sup> Dodge (2000) 382; Schreuer and Reinisch (2002) [201]; Shany (2003) 22.

<sup>144</sup> Reichert (1992) 239; Shany (2003) 22; Reinisch (2004) 43; ILA *Lis Pendens* Report [1.2].

<sup>145</sup> ILA *Res Judicata* Interim Report, 56. The more common reference is to a triple identity test requiring ‘an identity between the parties (*personae*), the object (*petitum*) and the legal ground (*causa petendi*)’. *Nicaragua v Colombia* (2016) [55]. See also *Interpretation of Judgments Nos. 7 and 8* (Diss Op Anzilotti), 23. But the conditions are often not described in exactly the same terms. See e.g. Schreuer and Reinisch (2002) [217]; Hobér (2014) 341, 360.



The same conditions are, *mutatis mutandis*, required for the application of litispendence.<sup>146</sup>

In investment treaty practice, these conditions constitute significant hurdles to applying *res judicata* and *lis pendens* to address overlaps between treaty and contract claims.<sup>147</sup> The two principles are generally deemed not applicable in relations between national and international courts,<sup>148</sup> often with reference to the superiority of international tribunals and proceedings over their national counterparts.<sup>149</sup> Further, contract and treaty claims differ at least in the grounds invoked (i.e., contract as opposed to treaty causes of action) and often also as to the parties involved. A few tribunals<sup>150</sup> adopt a substantive approach to the requirements identified above, i.e., one concentrating on the ‘economic realities’ of the investors and claims ultimately involved and not on formal distinctions as to the persons or causes of action,<sup>151</sup> but this approach has yet to garner widespread approval.<sup>152</sup> Yet the admissibility concept is broad enough to allow investment tribunals to consider some of the same legal reasons behind *res judicata* and *lis pendens* when dealing with potential overlaps between treaty and contract claims. The reasons include legal certainty (when for example a final decision has previously been rendered in the contract claim) and avoiding substantively conflicting outcomes.<sup>153</sup> Thus, proposals on a substantive approach to *res judicata* and *lis pendens* complement the thesis’ main arguments.

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<sup>146</sup> Reinisch (2004) 43-44, 50-52, 55, 61; Gallagher (2006) 339; Rivkin (2005) 294; ILA Lis Pendens Report, para 3.2; Magnaye and Reinisch (2016) 275-276.

<sup>147</sup> See Rivkin (2005) 294; Bentolila (2010) 128; Voss (2011) 289-290; Kaufmann-Kohler (2014) 8; Hobér (2014) 341, 360; Baumgartner (2016) 18.

<sup>148</sup> Reichert (1992) 249; Dodge (2000) 367-370; Schreuer and Reinisch (2002) [218]; Brownlie (2003) 50; Shany (2003) 242, 244, 254; Reinisch (2004) 51; Söderlund (2005) 315, 321; Rivkin (2005) 291; Voss (2011) 303; ILA Res Judicata Interim Report, 56; Magnaye and Reinisch (2016) 271, 286. The ILA did not include the same legal order requirement in its final recommendations because ‘a process of permeation and interaction between different legal orders is only beginning and may result in the legal community no longer viewing private law and public law as operating in separate legal orders’. ILA Res Judicata Final Report [40].

<sup>149</sup> See Reichert (1992) 249-250; Crivellaro (2005) 90-93. But see Douglas (2009) 381.

<sup>150</sup> See *Grynberg and RSM* (Award) [7.1.4-7.1.7]; *Apotex II* [7.40]; *Charanne* [408]; *Ampal* (Liability) [260]. But see ILA Res Judicata Final Report [49].

<sup>151</sup> ILA Res Judicata Interim Report, 57; Schreuer and Reinisch (2002) [222-239, 251-257]; Reinisch (2004) 56, 77; Crivellaro (2005) 115; McLachlan (2008) 415.

<sup>152</sup> The *res judicata* and *lis pendens* principles’ ‘mode of application to treaty-based arbitration proceedings remains an open question’. Magnaye and Reinisch (2016) 275.

<sup>153</sup> McLachlan (2008) 413.

(b) *Treaty provisions on coordination*

IIAs sometimes specifically address problems of coordination of related claims. The relevant provisions include, first, fork in the road provisions, which require the investor to choose among the dispute settlement procedures available under the treaty, and make that choice binding and definitive.<sup>154</sup> Second, waiver provisions requiring investors to expressly waive any other actual or potential claim they may have against the same measure involved in the IIA claim.<sup>155</sup> For example, among the ‘Conditions to the Submission of Claim to Arbitration’, the Free Trade Agreement (‘FTA’) between the European Union (‘EU’) and Singapore requires the claimant to withdraw ‘any pending claim submitted to a domestic court or tribunal concerning the same treatment’ and declare ‘that it will not submit such claim before a final award has been rendered’ pursuant to the treaty.<sup>156</sup> Third, IIAs may provide for the consolidation of different proceedings, which entails ‘combining two or more proceedings into one proceeding’.<sup>157</sup> The effectiveness and scope of these devices have certain limits, however.

Consolidation requires the consent of all the parties to the different proceedings sought to be merged into one, or a treaty provision, in principle applicable to all the proceedings in question, providing for consolidation.<sup>158</sup> Consent of opposing and otherwise different parties may not be easy to obtain and IIAs generally do not contain provisions on consolidation, except in certain specific contexts such as NAFTA.<sup>159</sup> Further, importantly for present purposes, existing IIA consolidation provisions cannot

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<sup>154</sup> Thus, these provisions prevent an investor from bringing a new claim before one of the fora available under the treaty if it has previously submitted the dispute to another forum. See e.g. US-Czech and Slovak Federal Republic BIT, Art VI(3)(a); Chile-Venezuela BIT, Art 8(3); Ecuador-US BIT, Art VI.3(a). See also Olavo Baptista (2005) 137; Kreindler (2005) 167-168; Salles (2014) 245.

<sup>155</sup> A well-known example is Article 1121 of NAFTA. See Lee (2001) 2669-2670 (provision seeks to prevent ‘claimants enjoying twice the benefits on their claims for damages’ and risks of ‘conflicting outcomes on the same issue’). See also *Waste Management II* (Preliminary Objection) [27]; Rivkin (2005) 285; McLachlan (2008) 398; Hobér (2014) 369.

<sup>156</sup> EU-Singapore FTA, Art 9.17. See also CETA, Art 8.22(f).

<sup>157</sup> *Canfor* (Consolidation) [77]. See also Kaufmann-Kohler (2014) 7.

<sup>158</sup> Orrego Vicuña (2005) 214; McLachlan, Shore and Weiniger (2017) 148. See also Rivkin (2005) 289 and Hobér (2005) 253 (both discussing, apart from consolidation, joinder or intervention of third parties as means to avoid duplicative proceedings, which also require consent of the parties to the proceeding).

<sup>159</sup> However, consolidation may become a more widely available and used mechanism to the extent the investment treaty regime evolves towards more centralized or ‘institutionalized’ frameworks (such as a permanent investment court) and in the context of states’ increasing awareness about the effects of parallel proceedings. See Orrego Vicuña (2005) 214; EU Concept Paper, 3 (‘CETA prohibits parallel proceedings’, the aim being to ‘avoid double compensation and divergent verdicts’).

be applied to aggregate international and local proceedings.<sup>160</sup> IIA provisions requiring waiver of local proceedings may be useful to the extent they apply to damages claims against the contested measure, regardless of the legal basis invoked and whether they are brought by the shareholder or the local company.<sup>161</sup> However, because IIA claimants argue, consistent with prevailing views, that their claims are based on their own rights and on their own damages (rather than on the rights and damages of the local company), some of the existing waiver requirements in IIAs may not prevent overlapping proceedings in all cases.<sup>162</sup>

Under fork in the road provisions, arbitral tribunals have dealt with arguments on the impact of national proceedings pursued by the company while the shareholder treaty claim was pending. As to such local proceedings, since there is often no identity of the parties and causes of action (i.e., contract as opposed to treaty claims), the shareholder is considered as not having elected another forum and thus entitled to continue its IIA claim.<sup>163</sup> However, the *H&H* tribunal observed that under the fork in the road clause in Article VII 3(a) of the Egypt-US BIT, the triple identity test was ‘not the relevant test as it would defeat the purpose’ of the provision, which was ‘to ensure that the same dispute is not litigated before different fora’.<sup>164</sup> It concluded that the bases of the contract and treaty claims at issue coincided because they had the same factual basis.<sup>165</sup> Thus, the provision was applicable regardless of differences in the causes of action and persons involved in the different claims.<sup>166</sup> Here again, the effect of fork in the road, waiver, and similar provisions depends on their actual existence in the treaty and their terms and/or on the consent of the disputing parties. Still, coordination mechanisms in IIAs, not least a ‘substantive’ reading of them (i.e., one focusing on the measures involved in the parallel

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<sup>160</sup> Even the consolidation of different IIA proceedings, for example when subject to different arbitral rules, may present considerable legal complexities. See Kaufmann-Kohler (2014) 7-8.

<sup>161</sup> Wehland (2016) 582; Baumgartner (2016) 19.

<sup>162</sup> See Reinisch (2004) 75-76 (discussing problems of coordination even in the case of the creation of a single investment treaty framework).

<sup>163</sup> See *Enron* (Jurisdiction I) [97-98]; Crivellaro (2005) 102; Hobér (2014) 364, 366.

<sup>164</sup> *H&H* [367].

<sup>165</sup> *Ibid* [378-381].

<sup>166</sup> *Ibid* [360-382]. Arguably, the decision was based on the language of the specific fork in the road clause, which required that ‘the dispute at hand not be submitted to other dispute resolution procedures’. *Ibid* [367]. Yet commentators have suggested similar approaches vis-à-vis fork in the road provisions generally. See Rivkin (2005) 288; McLachlan (2008) 396-397; Douglas (2009) 155-156. But see Schreuer (2004) 248.

claims), are consistent with the use of admissibility advanced in this thesis.<sup>167</sup> And so are treaty provisions expressly dealing with the admissibility concerns discussed here.<sup>168</sup>

### III. SCOPE AND STRUCTURE

This thesis analyses standing, cause of action, and damages aspects of shareholder treaty claims. The argument is that the failure by most investment tribunals to recognize substantive overlaps between shareholder treaty claims and related contract/national law claims results in: multiple recovery risks and potential prejudice to third party interests, as well as in an inadequate application of all sources of applicable law.

The thesis proposes, first, to acknowledge substantive overlaps between shareholder treaty claims and related contractual and national law claims, notwithstanding prevailing ideas of independence of IIA rights and claims. Second, to assess standing, cause of action, and damages in shareholder treaty claims as potentially affecting their admissibility pursuant to certain criteria. Jurisdictional debates are too ‘narrow’ to allow an examination of all the implications of substantive overlaps. This is particularly so in the context of investment arbitration, where the checklist for jurisdiction is short. And while merits considerations are not as constrained, reasons for tribunals to avoid a finding on a claim’s ultimate merits include procedural economy, preventing inconsistent decisions by investment tribunals and other fora, and the need for more flexible responses to the complexities of shareholder treaty claims.

The thesis advances the use of admissibility as a tool that allows investment tribunals to examine, and come to grips with, substantive overlaps between shareholder claims under IIAs and claims under other legal regimes. The question is whether (and when) IIA shareholder claims are, in whole or in part, inadmissible because of such overlaps. Given the risks of multiple recovery or prejudice to third parties, the issue is whether there are reasons for all or part of the compensation to go to a party different

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<sup>167</sup> See Kaufmann-Kohler (2014) 11-12 (arguing that ‘there is no ready-made solution available to avoid or reduce multiple proceedings’ and distinguishing between ‘occasional remedies’, such as consolidation, and efforts by ‘arbitral tribunals where they are given some discretion’).

<sup>168</sup> Although they are still uncommon, for example article 8.24 of the EU-Canada Comprehensive Economic and Trade Agreement (CETA) provides that when there is a potential for overlapping compensation and issues in dispute the CETA tribunal shall ‘stay its proceedings or otherwise ensure that proceedings brought pursuant to another international agreement are taken into account in its decision, order or award’. CETA, Art 8.24.

from the ‘treaty’ claimant and whether the contractual forum should resolve certain claims even if the treaty tribunal has jurisdiction over them.

The thesis further advocates that the law applicable to the substance of investment claims has to be seen in light of the possible substantive coincidence of treaty and contract claims. When the substance of these claims is largely the same, investment tribunals should not assume an absolute separation between national and international law,<sup>169</sup> not even for discrete aspects of a claim, *a fortiori* because national law is generally part of the applicable law in investment treaty arbitration. Rather, they should adopt a comprehensive approach to all sources of international investment law. This entails giving effect not only to IIA provisions, but also to all relevant provisions of national and general international law absent clear conflicts.

The discussion is structured around three central concepts: shareholder standing in respect of measures taken against the company, the contract claims/treaty claims distinction, and damages. Each of these concepts is discussed in a different chapter. The thesis, however, draws connections between standing and cause of action in particular because they combine to contribute to a problematic *status quo*. This examination sometimes involves considering elements closely connected to jurisdictional debates, to the merits, or both. Moreover, it often requires a joint consideration of standing, cause of action, and damages aspects.

This thesis contains seven substantive chapters.

Chapter 2 discusses the concept and the main characteristics of admissibility in general international law and in international investment law. It offers a potential mechanism to address some of the consequences of substantive overlaps between treaty and contract claims. The chapter also advances criteria that investment tribunals could consider to assess the admissibility of shareholder indirect claims under IIAs.

Chapter 3 examines the historical origins of the standing, cause of action, and damages ideas that are at the heart of this thesis. The focus is on decisions of *ad hoc* arbitral tribunals and ‘mixed claims commissions’ of the 19th and first half of the 20th centuries, in particular the Venezuelan and Mexican Commissions of 1903 and 1923-1934 respectively. The chapter aims to understand the context and function of the

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<sup>169</sup> See *H&H* [378]. But see *Noble Ventures* [53].

concepts from which the current position on shareholder standing and international causes of action evolved. It concludes that mixed claims commissions and *ad hoc* tribunals were already attentive to and dealt with the effects of overlaps between national and international claims. This chapter suggests that contemporary investment tribunals should adopt a similar approach.

Chapter 4 analyses shareholder standing in international law, first under general international law and then in international investment law. From an admissibility perspective, it scrutinizes the difference between shareholder treaty rights, as described by investment tribunals, and the company's contractual/national law rights. It shows that the two sets of rights overlap considerably. The chapter advocates a wider role for national and general international law on shareholder rights in admissibility/merits determinations, including principles connected to the company's independent legal personality.

Chapter 5 discusses damages in relation to shareholder indirect claims and the contract claims/treaty claims distinction. The damages dimension is key for this thesis because the substance of the claims is determined here based on the damages claimed. Using valuation methodologies, the chapter sheds light on the type of damages involved in shareholder treaty claims and the extent to which they differ from damages that may be raised in non-international claims by shareholders and companies. It shows that the harm is often the same, no matter how many entities in a corporate chain have standing to sue, whether different causes of action are available, and irrespective of the valuation method employed. Considering the company's and third-party interests and other equitable considerations, investment tribunals must take into account this identity of harm when exercising their discretion to assess damages in shareholder indirect claims.

Chapter 6 focusses on causes of action in investment arbitration, including the distinction between contract and treaty claims and the notion of 'fundamental basis of the claim'. The chapter disputes the alleged independence between contract rights and obligations, on the one hand, and treaty rights and obligations, on the other. Tribunals need to recognize substantive overlaps between contract and treaty claims when addressing the substance of IIA claims. Thus, parallel local proceedings, all the provisions of the relevant contract (including forum selection clauses), and the conduct of both contractual parties are relevant factors in deciding the admissibility of treaty claims.

Chapter 7 discusses the law applicable to shareholder treaty claims. It argues in favour of an integrated approach to the applicable law, i.e., one that gives proper weight not only to the applicable IIA provisions but also to general international law and national law. The reason for this is, first, that IIA provisions, including applicable law clauses, commonly require the application of the three sources of law. Second, overlaps between international and national law claims call for consideration and application of this latter legal system. And thirdly, admissibility determinations are not focussed on the scope of treaty provisions containing consent to international jurisdiction but on the content of specific claims (thus often involving substantive aspects).

Chapter 8 concludes. The failure of most investment tribunals to recognize substantive overlaps between shareholder treaty claims and related contract/national law claims risks multiple recovery, potential prejudice to third parties, and an inadequate application of all sources of applicable law. This failure results from the mechanical application of two basic ideas by investment tribunals and most of the literature: shareholder standing to bring indirect claims and the contract/treaty claims distinction. These ideas provide useful conceptual tools for jurisdictional purposes. Yet as regards admissibility and the merits, the orthodox approach has problematic consequences for shareholder treaty claims.

## 2 *Admissibility in International Investment Law*

Absent specific provisions in the jurisdictional titles, an international tribunal's jurisdiction is not affected by the jurisdiction of other international tribunals over the same or similar claims.<sup>1</sup> This is a by-product of international tribunals not forming a unified structure, let alone a hierarchical one.<sup>2</sup> As independent entities vis-à-vis each other, there is no reason why the scope of an international tribunal's jurisdiction should be curtailed to the extent it coincides with that of another international tribunal. There is also no general rule to this effect.<sup>3</sup> This observation applies at least with equal force when the overlap is with a national court's jurisdiction,<sup>4</sup> in particular when the primacy of international law and international proceedings applies.<sup>5</sup>

Yet despite international law's apparent indifference to such overlaps as a jurisdictional matter,<sup>6</sup> the concept of admissibility is broader. It includes an open list of reasons for a tribunal not to rule on the merits of claims.<sup>7</sup> Thus, admissibility is a tool potentially available to investment tribunals to address overlap claims.<sup>8</sup> In considering interactions between shareholder IIA claims and contract/national law claims, investment tribunals have based their findings on the observation that the two groups of claims often involve different persons and different legal bases. This is why the concept of

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<sup>1</sup> Salles (2014) 156.

<sup>2</sup> Rosenne (1998) 529; Shany (2003) 109; McLachlan (2008) 458; Hobér (2014) 118. Even if there were an international authority who could resolve problems of overlapping jurisdictions, one would still have to deal with the absence of clear rules on the issue. See Thirlway (2001) 11; Orrego Vicuña (2005) 206.

<sup>3</sup> Salles (2014) 156. As to parallel or subsequent overlapping proceedings, in international law the principles of *res judicata* and *lis pendens* discussed in Chapter 1 arguably do not concern international tribunals' jurisdiction. See *Nicaragua v Colombia* (2016) [47-48] (stating that Colombia's preliminary objection based on the principle of *res judicata* had 'the characteristics of an objection to admissibility'). See also Tams (2005) 23; Walters (2012) 678-679; De Brabandere (2012) 632; ILA Res Judicata Interim Report, 65; ILA Res Judicata Final Report [68]; ILA Lis Pendens Report [5.6].

<sup>4</sup> McLachlan (2008) 468.

<sup>5</sup> Crivellaro (2005) 91-96; Voss (2011) 303-305. In the case of investment tribunals, jurisdictional overlaps vis-à-vis national courts may not only be substantive, i.e., referring to the same measure or damages, but also formal. For example, when investment tribunals have jurisdiction over contract claims.

<sup>6</sup> The fact that international tribunals' jurisdiction as such is not affected does not mean that international law contains no relevant rules. Gaja argued that a competent international tribunal may consider whether 'to avoid the exercise of overlapping jurisdictions, judicial propriety should not require [it] to refrain from examining the merits of the dispute'. Gaja (2006) 540.

<sup>7</sup> Brown (2005); Shany (2015) 12.

<sup>8</sup> De Brabandere (2012) 630.



admissibility is analysed in the thesis in relation to standing and cause of action. Of course, an admissibility objection may also refer to other aspects, including those more directly connected to judicial propriety in a strict sense.<sup>9</sup> However, while the thesis provides a definition broad enough to include all admissibility objections, those other aspects are not discussed.

A shareholder of a protected nationality is required to hold, directly or indirectly, shares in a company incorporated in the host state and allege a treaty cause of action. Here, consent to international jurisdiction is present. Yet shareholder indirect claims involve complexities that go beyond jurisdictional aspects of standing and cause of action, i.e., whether the shareholder is a covered investor holding a protected investment and whether the fundamental basis of the claim is a treaty breach. Under the orthodox view, risks of multiple recovery and prejudice to third parties deriving from IIA claims do not affect consent and are thus irrelevant for jurisdictional purposes. They may be considered, if at all,<sup>10</sup> at the damages phase. However, admissibility refers to legal grounds not to hear a claim or reject it after hearing the evidence for reasons different from jurisdiction or the merits. The concept is, first, broad enough to allow meaningful consideration of the complexities identified above. Second, it allows tribunals to tailor admissibility decisions to the specific circumstances of each claim, notwithstanding general notions such as the existence of an investment or a claim of treaty breach which pertain to jurisdiction. This allows investment tribunals to decide that only part of the shareholder claims is inadmissible rather than the whole case, or to suspend rather than terminate the proceedings.

First, this chapter provides an overview of the concept of admissibility. Second, it distinguishes admissibility from jurisdictional and merits determinations. Third, it adopts a definition of admissibility and discusses the scope of investment tribunals' powers to decide on admissibility objections. Finally, the chapter argues for the adoption of admissibility criteria applicable to shareholder indirect claims.

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<sup>9</sup> Shany (2015) 48. Fitzmaurice, however, characterized the objection discussed by the ICJ in *Monetary Gold* on the absence of a necessary party to the proceedings as raising 'essentially grounds of propriety'. *Northern Cameroons*, 102 (Sep Op, Fitzmaurice). This kind of objection relates to issues discussed here, such as possible prejudice to third parties stemming from shareholder indirect claims.

<sup>10</sup> However, multiple recovery risks stemming from shareholder IIA claims and the company's claims are not always recognized, arguing that the causes of action are 'independent'. See Schill (2010) 217.

## I THE ADMISSIBILITY CONCEPT

### A Overview

Admissibility is an elusive yet firmly entrenched idea in international law. The difficulty to define it and its continued vitality have the same origin. Admissibility refers to tribunals limiting the exercise of their jurisdiction or exercising it in a certain way to protect an open list of legal principles. Although connected in certain cases to preserving the legitimacy of the judicial function, admissibility is broader, first, in that it also covers certain specific conditions on the right to claim.<sup>11</sup> Second, admissibility serves in some cases to actively enforce important rules, such as respect for third-party rights, rather than functioning as a limit on the exercise of the adjudicative power. Admissibility's main goal is to prevent the pursuance of legal proceedings or a decision on a claim's merits from affecting legally protected interests. The interests in question may be of one of the parties to the dispute, of third parties, or even of the international community, for example in seeing that international tribunals are not used for purposes different from those for which they were created.<sup>12</sup>

The admissibility grounds this thesis advances are based on the substance of shareholder indirect claims rather than the investor's non-compliance with procedural requirements. Thus, they refer to the 'substantive admissibility of the claim' and are distinguishable from jurisdictional objections, which mean that the tribunal 'is incompetent to give any ruling at all'.<sup>13</sup> Nevertheless, an admissibility objection relies on some ground other than the claim's 'ultimate merits'.<sup>14</sup> Brownlie formulated the following distinction:

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<sup>11</sup> See Abi-Saab (1967) 146-7 (distinguishing between specific admissibility conditions and general admissibility considerations relating to the limits of the judicial function). See also, generally, Giuffrida (1995).

<sup>12</sup> Kolb's suggestion that admissibility questions involving 'matters of public interest' are more important than those involving matters of 'private interest', i.e., those of the parties to the dispute, is questionable. Kolb (2013) 202-203. The same admissibility ground may involve interests of a different character. Whether the interests are of a 'public' or 'private' character depends not only on the facts of the case but also on the legal evolution of each principle involved.

<sup>13</sup> Fitzmaurice (1986) 438.

<sup>14</sup> Ibid.

Objections to jurisdiction, if successful, stop all proceedings in the case, since they strike at the competence of the Tribunal to give rulings as to the merits or admissibility of the claim. An objection to the substantive admissibility of a claim invites the Tribunal to reject the claim on a ground distinct from the merits...<sup>15</sup>

In this thesis, admissibility is concerned with the potential overlaps between certain IIA claims by shareholders and non-international claims. It does not refer, however, to whether the overlapping claims have merit under the different instruments in question.<sup>16</sup>

## B Definition of admissibility

As this section shows, neither applicable provisions nor awards of investment tribunals provide a definition of admissibility, let alone a widely accepted one. The considerable overlaps between jurisdiction, admissibility, and the merits,<sup>17</sup> discussed below, make it difficult to arrive at a single definition of admissibility that can cover all scenarios. Further, admissibility objections are sometimes intertwined with jurisdictional or merits defences, as regards the case as a whole or some of the claims.

Admissibility is defined here as legal reasons relating to the claim or the claimant (or both)<sup>18</sup> for an investment tribunal not to hear a claim or to reject it in whole or in part after hearing the evidence, which are different from the ultimate merits, in circumstances in which jurisdiction is present or assumed to be present.<sup>19</sup> Whether the objection refers to the specific content of the claim or to the tribunal is a helpful indicium—in particular to distinguish between admissibility and jurisdiction—yet it is not decisive in all cases. Thus, while admissibility focuses on the claim's and the claimant's characteristics, the tribunal's characteristics may also be relevant. For example, in a shareholder treaty claim deriving in whole or in part from contractual breaches, it is a relevant criterion for admissibility purposes that the investment tribunal is not the contractual forum. Further, under the definition adopted here, if an investment tribunal has found certain claim by a specific claimant inadmissible, it does not follow that a different forum should find the same claim by the same or a different claimant inadmissible.

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<sup>15</sup> Brownlie (1998) 479.

<sup>16</sup> See *Nicaragua v Colombia* (2012) [112].

<sup>17</sup> Shany (2015) 86.

<sup>18</sup> In *Abaclat*, Abi-Saab argued that 'admissibility conditions relate to the claim, and whether it is ripe and capable of being examined judicially, as well as to the claimant, and whether he or she is legally empowered to bring the claim to court'. *Abaclat* (Diss Op, Abi-Saab) [18].

<sup>19</sup> Determining whether an objection goes to consent depends on the circumstances of each case, in particular the content of the consent instruments invoked. Kolb (2013) 206; Salles (2014) 173.

Yet, while the thesis advances this definition of admissibility, two clarifications are necessary: i) as noted, this thesis deals with the concept of substantive admissibility, not with the ‘correct procedural steps for bringing the dispute’ as provided in the applicable procedural rules.<sup>20</sup> The latter notion, generally referred to as seisin or procedural admissibility,<sup>21</sup> is of fundamental importance for a tribunal to be able to deal with a claim but it is not the focus here. Nor is the thesis concerned with another common use of the word admissibility, i.e., the admissibility of evidence into a legal proceeding. And ii) the concept of admissibility is applied to certain interlinked preoccupations related to standing, cause of action, and damages. No attempt is made to provide a comprehensive list of possible admissibility objections.<sup>22</sup>

For Paulsson, in contrast to the definition of admissibility above, a fundamental question to distinguish between jurisdiction and admissibility is whether the objection focuses on the tribunal or on the claim.<sup>23</sup> Jurisdictional objections deny the existence of consent to arbitral jurisdiction, while admissibility ones advance other impediments to consideration of the merits without questioning ‘the investiture of the tribunal as such’.<sup>24</sup> A jurisdictional objection seeks a declaration that the tribunal in question cannot hear the claim, while admissibility pleas advance that the claim should not be heard by any forum, either permanently or temporarily.<sup>25</sup> The reference to any forum is not persuasive. It is true that jurisdictional challenges advance a lack of consent to a specific forum and do not necessarily apply to other fora. But the legal reasons that make a claim inadmissible before a specific tribunal may not apply or be less compelling before another tribunal. For example, admissibility arguments connected to the existence of a contractual forum selection clause and the need to respect the ‘contractually-agreed process’<sup>26</sup> may be raised before the investment treaty tribunal, but are not applicable before the contractual forum.

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<sup>20</sup> Fitzmaurice (1986) 440.

<sup>21</sup> Douglas (2009) 144.

<sup>22</sup> Whether this would be desirable or even possible is a different matter. See Witenberg (1932) 18.

<sup>23</sup> Paulsson (2005) 616. See also Walters (2012) 660.

<sup>24</sup> Paulsson (2005) 616-617.

<sup>25</sup> Ibid, 617. See also Walters (2012) 660; Wehland (2017) 232

<sup>26</sup> See *SGS v Philippines* [163].

Arguably, jurisdiction must have been affirmed before admissibility may be considered,<sup>27</sup> since if jurisdiction is not present ‘the Tribunal may not examine the case at all’.<sup>28</sup> Yet the practice of international tribunals is not consistent in this respect.<sup>29</sup> Fitzmaurice observed that a tribunal duly seised of a case is possessed of a ‘preliminary competence’ to, in certain circumstances, decide on admissibility objections ‘irrespective of, and without deciding, the question of its competence’.<sup>30</sup> Investment tribunals may exercise their inherent power to adopt admissibility decisions (discussed below) before affirming their jurisdiction,<sup>31</sup> not least when the objection does not require passing upon the merits. In clear cases of inadmissibility, this only brings forward the decision to reject the claim, avoiding the jurisdictional debate. It may thus be desirable from a procedural economy point of view.<sup>32</sup> However, investment tribunals should be cautious in ruling on admissibility before having settled their own jurisdiction. A decision rejecting admissibility objections, when followed by another decision denying jurisdiction, has the effect of unnecessarily prolonging the proceedings.

Further, while admissibility focusses on each claim and even on discrete elements of a claim, it may refer to the propriety of the arbitral procedure itself (aside from jurisdictional matters). Inadmissibility grounds may arise because the continuation of the arbitral proceedings offends against rules or principles recognized by the applicable law. In the decision on jurisdiction, the tribunal in *Hochtief* had to consider an objection based on the failure by the claimant to previously submit the investment dispute to local courts, as required by the applicable BIT.<sup>33</sup> In deciding whether this requirement could be bypassed through the application of the MFN clause,<sup>34</sup> the decision observed that ‘[a] tribunal might decide that a claim of which it is seised and which is within its jurisdiction

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<sup>27</sup> Paulsson (2005) 604; Walters (2012) 660; Baumgartner (2016) 220; Wehland (2017) 232.

<sup>28</sup> *Micula* [64]. See also *Kilic Insaat* (Award) [6.4.1-6.4.2, 6.6.1]; *Isolux* [709]; Kolb (2013) 202; Steingruber (2014) 680.

<sup>29</sup> As Fitzmaurice noted, in *Interhandel* the ICJ ‘upheld a plea of inadmissibility, although an objection to its jurisdiction was still outstanding, and was never disposed of’. *Northern Cameroons*, 102 (Sep Op, Fitzmaurice). See also Kolb (2013) 205.

<sup>30</sup> *Northern Cameroons*, 104 (Sep Op, Fitzmaurice). See also Shany (2015) 133.

<sup>31</sup> But see De Brabandere (2012) 613.

<sup>32</sup> Kolb (2013) 247.

<sup>33</sup> *Hochtief* (Jurisdiction) [12-111].

<sup>34</sup> *Ibid* [56-111].

is inadmissible'.<sup>35</sup> But while advancing the distinction between jurisdiction and admissibility,<sup>36</sup> in the jurisdictional phase the *Hochtief* tribunal did not define what admissibility is. In the decision on liability, however, it added:

The Tribunal considers that the principles governing the admissibility of claims are rooted not only in the notion of a claim that is inherently ripe and properly made, but also in the proper administration of justice. Admissibility is concerned both with the claim itself and with the arbitral process.<sup>37</sup>

The tribunal considered that in the jurisdictional decision it had ruled on its own jurisdiction, but had not wholly settled the 'admissibility of each element of the claims'.<sup>38</sup>

Without defining the two concepts, Article 79 of the ICJ's Rules of Court expressly distinguishes between jurisdiction and admissibility.<sup>39</sup> The ICJ itself has explained that '[o]bjections to admissibility normally take the form of an assertion that, even if the Court has jurisdiction and the facts stated by the applicant State are assumed to be correct, nonetheless there are reasons why the Court should not proceed to an examination of the merits'.<sup>40</sup> Rosenne advanced that admissibility refers to whether the case should be entertained, which entails granting the tribunal some discretion in deciding whether to hear the claim.<sup>41</sup> Douglas refers, on the one hand, to the existence of jurisdiction in international investment law, which depends on the presence of consent and a foreign investment.<sup>42</sup> On the other hand, '[a]dmissibility deals with the suitability of the claim for adjudication on the merits'.<sup>43</sup> Admissibility relates to the exercise of jurisdiction<sup>44</sup> and the specifics of each claim, rather than the dispute as a whole.<sup>45</sup>

Other authors, however, have doubted the usefulness of the distinction between jurisdiction and admissibility in investment arbitration. Laird observed that because the

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<sup>35</sup> Ibid [90].

<sup>36</sup> Ibid [94].

<sup>37</sup> *Hochtief* (Liability) [206]. This decision rejected part of the claims based on an admissibility objection. Ibid [187-194].

<sup>38</sup> Ibid [149].

<sup>39</sup> Rules of Court, Art 79.

<sup>40</sup> *Oil Platforms* (Merits) [29].

<sup>41</sup> Rosenne (2006) [2]. See also Shany (2015) 8.

<sup>42</sup> Douglas (2009) 144.

<sup>43</sup> Ibid, 148.

<sup>44</sup> Newcombe (2011) 193; Waibel (2015) 1216.

<sup>45</sup> Waibel (2015) 1213.

goal of both types of objections is to ‘avoid a merits phase’, the distinction is probably unnecessary.<sup>46</sup> He also pointed to the absence of provisions granting investment tribunals the power to render admissibility decisions.<sup>47</sup> Heiskanen argued that jurisdiction concerns the scope of the state’s consent to arbitrate, while admissibility refers to the claim’s temporal, personal, and substantive characteristics.<sup>48</sup> But jurisdiction and admissibility are ‘one and the same concept, only viewed from a different viewpoint—one from the perspective of the tribunal (competence), the other from the perspective of a claim (admissibility)’.<sup>49</sup>

However, as noted, the focus on the claim rather than the tribunal is a common yet not the defining characteristic of admissibility objections,<sup>50</sup> *inter alia* because admissibility may be concerned with the arbitral procedure generally and thus with both the tribunal and the claim. Nor do all admissibility objections avoid the merits phase. Investment tribunals have adopted inadmissibility decisions after hearing the merits.<sup>51</sup> This thesis advances that investment tribunals have the power to tackle certain problematic consequences of shareholder indirect claims, namely risks of multiple recovery and prejudice to third parties, through the application of admissibility. National and international provisions of the law applicable in investment disputes often address these problems. But investment tribunals have not seen them as affecting their jurisdiction or even the merits of IIA claims. A few tribunals have suggested that risks of double recovery may be addressed at the damages phase. But to the extent concrete solutions have been advanced, they involve their own problems<sup>52</sup> as well as being largely unexplored and untested.

### C Delimitation of admissibility vis-à-vis jurisdiction and merits

An admissibility objection may be difficult to distinguish from a jurisdictional one, as even those who defend the usefulness of the distinction note.<sup>53</sup> After all, both types of

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<sup>46</sup> Laird (2005-I) 222. See also Heiskanen (2014) 245.

<sup>47</sup> Laird (2005-I) 222.

<sup>48</sup> Heiskanen (2014) 242.

<sup>49</sup> Ibid, 243. For a specific criticism of this idea see Steingruber (2014) 680.

<sup>50</sup> Douglas (2009) 148.

<sup>51</sup> See *Hochtief* (Liability) [187-194].

<sup>52</sup> See Chapter 1.

<sup>53</sup> Newcombe (2011) 192; Kolb (2013) 200; Salles (2014) 145; Waibel (2015) 1213-1214; *İçkale* [245].

objections are generally categorized as preliminary objections that, if successful, will bring the proceedings as regards all or part of the claims to an end for reasons that are, at least strictly speaking, different from the merits.<sup>54</sup> On the other hand, it is also often observed that admissibility may be closely connected with the merits.<sup>55</sup> Indeed, under certain definitions of admissibility—for example, ‘whether the investor’s claim can benefit from the substantive protection of the investment treaty’—<sup>56</sup> the link between admissibility and merits is readily apparent. Thus, there may be a ‘twilight zone’<sup>57</sup> both between admissibility and jurisdiction and between admissibility and the merits.

## 1 *Admissibility and jurisdiction*

Admissibility is concerned with whether a claim should be considered or its merits decided not because of want of authority, but rather because there are other legal reasons that require that the claim not be considered or its merits not be decided by the international tribunal.<sup>58</sup> Yet, first, although the existence of consent is the jurisdictional enquiry par excellence, consent-related matters may play a role in admissibility determinations. For instance, the consent of the disputing parties (or related entities) to the jurisdiction of a different tribunal as regards a certain claim does not negate the investment tribunal’s jurisdiction over it.<sup>59</sup> But the overlap between consent to an international and a contractual jurisdiction is a relevant admissibility consideration.<sup>60</sup> Second, while jurisdictional discussions in investment treaty arbitration tend to be focused on international law provisions,<sup>61</sup> the legal reasons that affect admissibility may originate in any provision of the applicable law, including national law. This is important since the overarching admissibility consideration here refers to substantive overlaps between shareholder treaty claims and national law claims.

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<sup>54</sup> *Application Genocide Convention II* [120].

<sup>55</sup> Brownlie (1998) 479; Shany (2015) 84; *Enron* (Jurisdiction I) [33]; *Sempra* (Jurisdiction) [109].

<sup>56</sup> Steingruber (2014) 688. See also *Tecmed* [4] (referring to the ‘substantive admissibility of claims by the foreign investor, i.e. its access to the substantive protection regime contemplated under the Agreement’).

<sup>57</sup> Paulsson (2005) 608-614; Waibel (2015) 1274.

<sup>58</sup> See Viñuales (2017) 358.

<sup>59</sup> See Cremades and Cairns (2005) 32.

<sup>60</sup> Walters argued that an admissibility challenge ‘does not contest that a particular tribunal is the proper forum to try a claim’. Walters (2012) 660. Admissibility does not challenge the tribunal’s adjudicative authority. Yet, that a claim was filed before a certain tribunal and not another may be germane to admissibility.

<sup>61</sup> But national law may also be relevant in such discussions. See Chapter 7.



In *Certain Questions of Mutual Assistance in Criminal Matters*, the ICJ stated that ‘in determining the scope of the consent expressed by one of the parties, the Court pronounces on its jurisdiction and not on the admissibility of the application’.<sup>62</sup> Quoting *Armed Activities on the Territory of the Congo*, the ICJ added that the examination of conditions to which consent to its jurisdiction is subject relates to jurisdiction and not to admissibility.<sup>63</sup> These conditions will comprise *ratione personae*, *ratione materiae*, and *ratione temporis* aspects, which jointly determine the scope of the Court’s jurisdiction accepted by the parties to the dispute.<sup>64</sup> In principle, therefore, an objection to any of those aspects will be a jurisdictional objection.<sup>65</sup> For the ICJ, the essential element of distinction is consent, with discussions as to its scope being jurisdictional and not admissibility matters. Further, jurisdiction appears more directly linked to the Court itself and the general limits to its operation as accepted by the disputing states, while admissibility relates to the contents of the specific claim.<sup>66</sup>

Investment tribunals’ approach to the distinction between admissibility and jurisdiction has been somewhat consistent.<sup>67</sup> To varying degrees, the direct link between admissibility and the claim’s characteristics and particularly between jurisdiction and consent, features in several decisions. In categorizing a mandatory requirement of prior submission of the investment dispute to local courts, the *ICS* tribunal stressed the importance of the distinction between jurisdiction and admissibility.<sup>68</sup> Following the ICJ’s rationale, it suggested that a jurisdictional condition is one to which the consent to arbitrate is subject, while non-compliance with admissibility requirements does not impinge on such consent.<sup>69</sup> The decision in *ICS* appeared to accept the *Hochtief* tribunal’s conceptualization that ‘[j]urisdiction is an attribute of a tribunal and not of a claim, whereas admissibility is an attribute of a claim but not of a tribunal’.<sup>70</sup> The *ICS* tribunal, however, criticized the jurisdictional decision in *Hochtief* for apparently substituting ‘the

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<sup>62</sup> *Certain Questions of Mutual Assistance in Criminal Matters* [48].

<sup>63</sup> *Ibid.*

<sup>64</sup> Rosenne (2006-I) [2].

<sup>65</sup> *Certain Questions of Mutual Assistance in Criminal Matters* [49].

<sup>66</sup> Walters (2012) 660.

<sup>67</sup> Brown (2005); Williams (2008) 919; Waibel (2015) 1274.

<sup>68</sup> *ICS* [252].

<sup>69</sup> *Ibid* [258].

<sup>70</sup> *Ibid*, fn 282.

tribunal-vs.-claim dichotomy for the question of consent instead of using it as an analytical tool for the determination of whether consent exists'.<sup>71</sup>

Other investment tribunal decisions, including *Achmea*<sup>72</sup> and *Micula*,<sup>73</sup> also appeared to endorse the 'tribunal-vs.-claim dichotomy' as a distinguishing criterion. Admissibility relates to the ability to exercise jurisdiction over a specific claim.<sup>74</sup> Yet the most important factor in characterizing an objection as a jurisdictional or an admissibility objection is determining whether it goes to consent and its scope.<sup>75</sup> Further, some tribunals have focused both on whether consent is affected and whether the condition in question is contained in the provision where consent is said to be found.<sup>76</sup> The tribunal in *Daimler* stressed that '[a]ll BIT-based dispute resolution provisions' are jurisdictional in nature.<sup>77</sup> For the *Micula* tribunal, an objection is jurisdictional when it 'relates to a requirement contained in the text on which consent is based'.<sup>78</sup>

Investment tribunals have generally opined that admissibility and jurisdiction 'are two distinct legal concepts under international law'.<sup>79</sup> Jurisdiction refers to the power of the tribunal to decide the dispute, in the terms defined by the parties' consent.<sup>80</sup> There are no generally agreed criteria to distinguish jurisdiction from admissibility in international investment law, however.<sup>81</sup> Yet most tribunals and commentators agree that: i)

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<sup>71</sup> Ibid.

<sup>72</sup> *Achmea II* [115].

<sup>73</sup> *Micula* [63].

<sup>74</sup> *Achmea II* [115].

<sup>75</sup> Ibid [116]. See also *ibid* [117-119].

<sup>76</sup> Fitzmaurice also focused on whether the objection arose from the jurisdictional clause. *Northern Cameroons*, 102-103 (Sep Op, Fitzmaurice).

<sup>77</sup> *Daimler* [193].

<sup>78</sup> *Micula* [64]; see also *Kilic Insaat* [6.2.9]; Laird (2005-I) 216. In *Armed Activities (New Application)*, the ICJ stated that when consent to jurisdiction 'is expressed in a compromissory clause in an international agreement, any conditions to which such consent is subject must be regarded as constituting the limits thereon'. *Armed Activities (New Application)* [88]. In *Certain Questions of Mutual Assistance in Criminal Matters* the Court added, however, that '[t]his remains true, whether the consent at issue has been expressed through a compromissory clause inserted in an international agreement... or through "two separate and successive acts"'. *Certain Questions of Mutual Assistance in Criminal Matters* [48].

<sup>79</sup> *Achmea II* [114]; *Goetz* [72]; *Unglaube* [293]; *Nova Scotia* [133, 147, 150]; Newcombe (2011) 195. Some investment tribunals have doubted the usefulness of the distinction in the context of investment treaty arbitration, albeit without denying it altogether. See *Daimler* [192]; *Kilic Insaat* [6.3.5]; *Panamerican* [54].

<sup>80</sup> *Nova Scotia* [147]; *Euram* [441].

<sup>81</sup> Certain commentators suggest that, in contrast to international investment law, the issue is settled as regards the ICJ. See Williams (2008) 919. But see Waibel (2015) 1218.

admissibility does not speak to whether consent to arbitrate has been granted.<sup>82</sup> It relates to the exercise of the tribunal's adjudicative power and does not focus on whether this power exists,<sup>83</sup> and ii) while the existence and scope of the tribunal's adjudicative power depends on the basic traits of the dispute as a whole—i.e., the personal, material, and temporal dimensions of the dispute—admissibility may be affected by the specific contents of each claim.<sup>84</sup>

Unlike jurisdiction, admissibility does not concern the 'authority in principle' of international tribunals.<sup>85</sup> For such authority to be present, however, not only must there be consent to international jurisdiction in general but also the claim in question must fall within the consent's scope. Otherwise, there is a jurisdictional defect, not an admissibility one. The fact that a condition is contained in a treaty's dispute resolution provisions may point to its jurisdictional character, but ultimately what matters is whether consent to international jurisdiction hinges on it. The basic jurisdictional question is whether there is a legal basis on which an international tribunal may summon someone to appear before it as a party. Or, in the case of *ad hoc* jurisdictions, whether there is a basis on which an international tribunal may be formed to hear the case in question. On the other hand, an admissibility objection seeks to prevent the full exercise of the adjudicative power vis-à-vis a specific claim, but does not deny the existence of this power.<sup>86</sup>

## 2 *Admissibility and the merits*

Admissibility includes a wide array of grounds, which evolve as the views and expectations vis-à-vis international tribunals change. While some admissibility grounds are related to, broadly speaking, procedural aspects, others involve substantive ones. Thus, links between admissibility and merits analyses are often inevitable.<sup>87</sup> Fitzmaurice distinguished between admissibility and the 'ultimate merits'; the term 'ultimate' was justified because an admissibility objection is frequently connected with the 'substantive

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<sup>82</sup> See *İçkale* [242]; Grisel (1968) 74-75; Salles (2014) 168; generally Markert (2010).

<sup>83</sup> Newcombe (2011) 193; Shany (2015) 132; *Achmea II* [115].

<sup>84</sup> Paulsson (2005) 616; Walters (2012) 660; Steingruber (2014) 681.

<sup>85</sup> Brownlie-Crawford (2012) 693.

<sup>86</sup> Thirlway (2001) 74.

<sup>87</sup> This is *a fortiori* the case in respect of inadmissibility grounds deriving from substantive overlaps between related claims.

merits’, often more so than jurisdictional issues.<sup>88</sup> Rosenne went a step further by observing that all admissibility objections require discussing the merits.<sup>89</sup> Jurisdictional objections may also be intertwined with the merits.<sup>90</sup> This is why Article 79 of the ICJ Rules of Court provides, for both jurisdictional and admissibility objections, that the Court may ‘declare that the objection does not possess, in the circumstances of the case, an exclusively preliminary character’ and order the continuation of the proceedings.<sup>91</sup>

As to investment arbitration, the *Methanex* tribunal—while it denied having the ‘express or implied power to reject claims based on inadmissibility’—<sup>92</sup> observed that the distinction featuring in Article 79 of the ICJ Rules of Court may give rise to ‘fine distinctions’ between admissibility objections and merits defences.<sup>93</sup> The *Enron* tribunal observed that the distinction between admissibility and jurisdiction does not appear in the ICSID Convention.<sup>94</sup> Yet, despite being an ICSID tribunal, it characterized an objection relating to shareholder standing as pertaining to admissibility and ruled on it.<sup>95</sup> Regardless, the tribunal added that ‘[a] successful admissibility objection would normally result in rejecting a claim for reasons connected with the merits’.<sup>96</sup>

The extent to which admissibility and the merits are linked depends on the character of the admissibility objection.<sup>97</sup> For example, in *Methanex* the admissibility objections filed by the US were ‘based upon the legal submission that, even assuming all the facts alleged by Methanex to be true, there could still never be a breach of the

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<sup>88</sup> Fitzmaurice (1986) 438. See also *Northern Cameroons*, 103 (Sep Op, Fitzmaurice); Douglas (2009) 148; Salles (2014) 95. In *India v Pakistan*, the ICJ used the terms ‘ultimate merits’ to distinguish merits from jurisdictional decisions, observing that the latter are also ‘substantial’ and ‘substantive’ in character. *India v Pakistan* [18].

<sup>89</sup> Rosenne (2001) 83.

<sup>90</sup> Shany (2015) 84.

<sup>91</sup> Rules of Court, Art 79 [9]. National jurisdictions often grapple with the difficulty of distinguishing between jurisdiction and merits. The US Supreme Court recalled that ‘[a]s Justice Holmes observed more than a century ago, “it sometimes may be difficult to decide whether certain words in a statute are directed to jurisdiction or to merits”’. *V. L. v E. L.*, 577 U. S. 6 (2016).

<sup>92</sup> *Methanex* (Jurisdiction) [126].

<sup>93</sup> *Ibid* [125].

<sup>94</sup> *Enron* (Jurisdiction I) [33].

<sup>95</sup> *Ibid* [52].

<sup>96</sup> *Ibid*.

<sup>97</sup> The same is true regarding the link between admissibility and jurisdiction.

individual provisions pleaded by Methanex'.<sup>98</sup> These objections required the interpretation of substantive provisions of NAFTA—including the national treatment, minimum standard of treatment, and expropriation provisions—and advanced that the alleged breach was not 'the proximate cause of the alleged loss', that the claimant had not suffered any loss, and that the measures accorded the same treatment to all investors in the relevant industry.<sup>99</sup> Here, the line that separates admissibility from the merits is fine.<sup>100</sup> Yet in investment treaty arbitration the claims' ultimate merits refer to whether there has been a breach of any of the standards of treatment contained in IIAs<sup>101</sup> and what consequences follow from any such breach. If the fundamental premise of an argument is that, on the facts of the case, an IIA standard of treatment<sup>102</sup> has not been breached, it is a merits defence.<sup>103</sup> However, substantive points, involving the existence, scope, or breach of a non-procedural right or obligation, may be involved in jurisdictional, admissibility, or merits decisions.<sup>104</sup>

#### D Investment tribunals' powers as regards admissibility decisions

The idea of admissibility raises distinct aspects in relation to investment tribunals' powers. First, generally as to these tribunals' capacity to deal with and decide on admissibility objections. Do investment tribunals have the power to adopt admissibility decisions given the absence of provisions expressly conferring them such power both in arbitral rules and IIAs? How is a decision finding a claim inadmissible to be reconciled with the obligation of tribunals to exercise their jurisdiction?<sup>105</sup> Second, assuming it exists, is the exercise of this power contingent on admissibility objections having been

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<sup>98</sup> *Methanex* (Jurisdiction) [109].

<sup>99</sup> *Ibid* [84-95].

<sup>100</sup> Laird (2005-I) 205. Paulsson is right that at least certain aspects of the US's admissibility objections in *Methanex*, such as for example the one advancing that there had been no discrimination, were in fact defences against the merits. Paulsson (2005) 607.

<sup>101</sup> When the investment tribunal may include breaches of sources of law other than the IIA within its liability findings, determining the existence of these breaches also forms part of the ultimate merits.

<sup>102</sup> Typical IIA standards of treatment include provisions on expropriation, the fair and equitable treatment principle, and prohibitions of discrimination or arbitrariness. Except when necessary to illustrate an argument connected to the admissibility aspects relevant here, this thesis does not discuss the scope of IIA standards of treatment either generally or under any specific treaty. Generally on IIA standards of treatment see Dolzer and Schreuer (2012).

<sup>103</sup> See Witenberg (1932) 18; Shany (2015) 84.

<sup>104</sup> *Barcelona Traction* (Preliminary Objections), 164 (Diss Op, Armand-Ugon); *Waste Management II* (Award) [43].

<sup>105</sup> See *Vivendi I Annulment* [112]; *Tokios Tokelès* (Jurisdiction) [39].

raised by the parties? If a party has waived potential admissibility objections, may an investment tribunal still reject all or part of the claims for admissibility reasons? Third, to what extent are jurisdictional and admissibility decisions different in terms of their reviewability? These aspects are considered in turn.

## 1 *Inherent power*

Article 79 of the ICJ's Rules of Court provides for the respondent state's right to object to 'the jurisdiction of the Court or to the admissibility of the application' as 'preliminary objections'.<sup>106</sup> It also refers generally to the filing of any 'other objection the decision upon which is requested before any further proceedings on the merits'.<sup>107</sup> No similar reference to admissibility may be found in the most widely used arbitral rules in investment arbitration, including the ICSID Convention, the ICSID Arbitration Rules, the ICSID Additional Facility Rules, and the 1976 UNCITRAL Rules.<sup>108</sup> The absence of such an express provision in the 1976 UNCITRAL Rules led the *Methanex* tribunal to conclude that, while it had the power to rule on jurisdictional objections, 'no separate power to rule on objections to "admissibility"' was conferred.<sup>109</sup> Further, there was no implied power in that regard.<sup>110</sup> A comparable position was adopted by Zeiler in respect of ICSID Arbitration Rule 41,<sup>111</sup> which refers to challenges to ICSID's jurisdiction or to the tribunal's competence but not to the claim's admissibility.<sup>112</sup>

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<sup>106</sup> Rules of Court, Art 79(1).

<sup>107</sup> Ibid.

<sup>108</sup> These arbitration rules only use the term admissibility in relation to the admittance of evidence into the arbitration record. See ICSID Arbitration Rules, Rule 34(1); ICSID Additional Facility Rules, Art 41; UNCITRAL Rules (1976), Art 25(6). But see Article 39(2) of the 2017 Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (including admissibility among the issues an arbitral tribunal may decide by way of summary procedure).

<sup>109</sup> *Methanex* (Jurisdiction) [107]. This tribunal also observed that the power to rule on admissibility objections could not be found in the NAFTA Treaty either. See *ibid* [123-124].

<sup>110</sup> *Ibid* [123]. The *Methanex* tribunal's rejection of admissibility decisions, however, was less categorical than it would appear at first sight. Regarding these decisions, it observed that '[t]he most analogous procedure under the UNCITRAL Arbitration Rules would be a partial award on a preliminary issue tried on assumed facts, pursuant to Article 32 of the UNCITRAL Arbitration Rules 13', which 'procedure, however, does not relate to jurisdiction; it necessarily assumes the exact opposite; and its existence confirms that it would be inappropriate to imply a like procedure into Article 21'. *Ibid*. This observation rules out admissibility decisions under Article 21 of the 1976 UNCITRAL Rules, which refers to jurisdictional determinations. But it does not completely exclude admissibility decisions under other provisions of the Rules. See *Chevron* (Jurisdiction and Admissibility) [4.91]; *Philip Morris v Australia* (Bifurcation) [118].

<sup>111</sup> Zeiler (2009) 90-91.

<sup>112</sup> ICSID Arbitration Rules, Rule 41.

In recent years, however, investment tribunals considering the admissibility concept appear to have generally assumed that they had the power to render admissibility decisions.<sup>113</sup> And while it is generally the respondent state who raises admissibility objections<sup>114</sup>—except vis-à-vis a counterclaim—for example in *Micula* it was noted that there was ‘no dispute between the Parties as to the jurisdiction of this Tribunal to decide the jurisdictional and admissibility challenges brought by Respondent pursuant to Article 41 of the ICSID Convention’.<sup>115</sup> In fact, even investment tribunals who have noted the absence of a distinction between admissibility and jurisdiction in the relevant arbitration rules<sup>116</sup> have sometimes adopted admissibility findings.<sup>117</sup> The *Urbaser* tribunal was sceptical about the distinction, noting that ‘the ICSID Convention does not contain a concept akin to “admissibility” of claims’.<sup>118</sup> Yet it appeared to concede that admissibility objections may be entertained, depending on the stage at which they are raised, either ‘within a jurisdictional framework’ or ‘merged with the merits’.<sup>119</sup> Finally, in certain cases the application of the admissibility concept had a material impact on the outcome.<sup>120</sup>

While its boundaries under international law have never been wholly precise, admissibility appears as a generally accepted concept in international adjudication.<sup>121</sup> The distinction between jurisdiction and admissibility was already acknowledged by the ICJ in the *Ambatielos* and *Nottebohm* cases,<sup>122</sup> independently from its later adoption in the

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<sup>113</sup> See *Achmea II* [114-120]; *Unglaube* [293]; *ICS* [256]; *Philip Morris v Uruguay* (Jurisdiction) [142]; *ST-AD* [295]; *Teco* [628]; *Romp petrol* (Jurisdiction) [112]; *RREEF* (Jurisdiction) [225].

<sup>114</sup> References by states to admissibility in investment arbitration include *AMT* [5.34] (Zaire); *Ethyl* [75] (Canada); *Bayindir* (Jurisdiction) [84-86] (Pakistan); *Libananco* (Preliminary Issues) [62] (Turkey); *Chevron* (Jurisdiction and Admissibility) [1.30] (Ecuador); *LESI* (Award) [170] (Algeria); *Iberdrola* (Award) [257, 260] (Guatemala); *Philip Morris v Australia* [184] (Australia); *Charanne* [394] (Spain); *Rusoro* [350] (Venezuela); *Amto* [59] (Ukraine). State practice in raising admissibility objections is at least as important as arbitral decisions in assessing admissibility’s acceptance in international investment law. On the possibility of pleadings before international tribunals to constitute state practice for purposes of international customary law formation see, e.g., Mendelson (1998) 204.

<sup>115</sup> *Micula* [58].

<sup>116</sup> *CMS* (Jurisdiction) [41].

<sup>117</sup> *Ibid* [35] (rejecting an admissibility objection and concluding that the claim was ‘admissible’).

<sup>118</sup> *Urbaser* (Jurisdiction) [112-125].

<sup>119</sup> *Ibid* [126].

<sup>120</sup> *SGS v Philippines* [154]; *Hochtief* (Liability) [187-194]; *Abaclat* (Jurisdiction) [245-248].

<sup>121</sup> Salles (2014) 143; Shany (2015) 49.

<sup>122</sup> Fitzmaurice (1986) 438-440. Fitzmaurice also notes that the PCIJ was less enthusiastic about the distinction. *Ibid*, 439. Yet even if the Rules of the PCIJ only used the concept of preliminary objection, without distinguishing between admissibility and jurisdictional objections, ‘already at that time it was

Rules of the Court. In *Nottebohm*, the ICJ noted that it had to exercise its powers ‘whenever it has been regularly seised and whenever it has not been shown, on some other ground, that it lacks jurisdiction or that the claim is inadmissible’.<sup>123</sup> To the extent general international law empowers tribunals to consider the admissibility of claims,<sup>124</sup> there would seem to be no impediment for investment treaty tribunals to entertain admissibility objections.<sup>125</sup> International law forms part of the applicable law tribunals operating under IIAs must apply, either expressly or by necessary implication.<sup>126</sup> Several authors have affirmed that the ability to decide on admissibility objections is an inherent power of international tribunals.<sup>127</sup> The ICJ itself appeared to acknowledge such inherent power when it stated in *Northern Cameroons* that if it ‘is satisfied, whatever the nature of the relief claimed, that to adjudicate on the merits of an Application would be inconsistent with its judicial function, it should refuse to do so’.<sup>128</sup>

Conceptualizing international tribunals’ power to adopt admissibility decisions as an inherent power is the correct approach.<sup>129</sup> Yet two refinements are important here. First, admissibility relates to the need for international tribunals to uphold the rule of law on the international plane.<sup>130</sup> Whenever possible, international tribunals must avoid adopting decisions that, while involving the application of rules and principles of applicable law, would also go against other principles or rules recognized by such law.<sup>131</sup>

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recognized that the provision encompassed any obstacles which might prevent the PCIJ from considering the merits of a case pending before it’. Tomuschat (2012) 698.

<sup>123</sup> *Nottebohm* (Preliminary Objection), 122.

<sup>124</sup> According to Witenberg, ‘admissibility will have custom as the essential source’. Witenberg (1932) 15. Further, ‘custom and international jurisprudence’ had played and would continue to play the ‘largest role’ in contributing to the admissibility notion. Ibid, 123. Author’s translation (original French).

<sup>125</sup> De Brabandere (2012) 614.

<sup>126</sup> See Chapter 7.

<sup>127</sup> Newcombe (2011) 194; Salles (2014) 140; Shany (2015) 50, 138.

<sup>128</sup> *Northern Cameroons*, 37. See also Shany (2015) 50 (arguing that both *Northern Cameroons* and *Nuclear Tests* support the idea of an inherent power as regards admissibility).

<sup>129</sup> See De Brabandere (2012) 621; *Philip Morris v Australia* (Bifurcation) [118].

<sup>130</sup> See A/RES/67/1. Shany mentions ‘preserving legality’ as an admissibility consideration, referring to the PCIJ’s view in *Minority Schools in Upper Silesia* that it should not exercise jurisdiction when doing so would violate a different jurisdictional arrangement between the parties. Shany (2015) 138.

<sup>131</sup> In the case of investment tribunals, this is often not limited to international law and also includes some national law. See also *Northern Cameroons*, 128 (Sep Op, Fitzmaurice) (admissibility objections may stem from general principles of law or provisions of the applicable treaty different from the jurisdictional clause); Salles (2014) 140 (preliminary objections may refer to ‘any international norm binding on the relationship between the two disputing parties’).



This is why it is not possible to draw a comprehensive list of possible admissibility objections.<sup>132</sup> Second, a decision rejecting a claim on admissibility grounds entails an exercise of jurisdiction even if not an adjudication of the merits.<sup>133</sup> An admissibility decision typically says something about substantive aspects,<sup>134</sup> in circumstances in which jurisdiction has already been affirmed or is assumed. In principle, this observation addresses possible criticisms derived from international tribunals' duty to exercise jurisdiction when regularly seised and competent.<sup>135</sup>

Still, when a tribunal decides on admissibility without hearing the merits, the parties will not have had the chance to fully present their case. The difference between this kind of decision and one denying jurisdiction is subtle, both in terms of process and outcome. As the *Hochtief* tribunal observed, when the admissibility objection is 'bound up' with the merits of the claim and the tribunal has jurisdiction, in principle it should hear the case before deciding on admissibility.<sup>136</sup> Shareholder standing and the contract claims/treaty claims distinction—the two main issues to which the admissibility discussion refers here—although related to jurisdiction, will often require a thorough understanding of the facts of the case.<sup>137</sup> As to their admissibility aspects, such issues will thus frequently be best decided after having heard the merits of the claim. Even in this case, however, the tribunal will still be resolving a preliminary question,<sup>138</sup> in that it will not be pronouncing on the ultimate merits of the claim. This preliminary character is independent from the stage of the proceedings at which the admissibility objection is decided and indeed from whether there is a preliminary phase at all.<sup>139</sup>

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<sup>132</sup> The ICJ stated that an admissibility objection 'consists in the contention that there exists a legal reason, even when there is jurisdiction, why the Court should decline to hear the case'. *Application Genocide Convention II* [120].

<sup>133</sup> *Northern Cameroons*, 101 (Sep Op, Fitzmaurice); Newcombe (2011) 193; Salles (2014) 156. But see *Alemanni* [318]; Shany (2015) 1, 47, 52, 131.

<sup>134</sup> Kolb (2013) 247.

<sup>135</sup> See *Northern Cameroons*, 101-102 (Sep Op, Fitzmaurice); *Rompetrol* (Jurisdiction) [115]; *Iberdrola* (Annulment) [80].

<sup>136</sup> *Hochtief* (Liability) [206].

<sup>137</sup> Witenberg observed that most admissibility objections may require a consideration of the facts. Witenberg (1932) 105.

<sup>138</sup> *Hochtief* (Liability) [178]. Paulsson categorises matters of admissibility as 'threshold issues'. Paulsson (2005) 617.

<sup>139</sup> Salles (2014) 82.

## 2 *Tribunals' powers and party autonomy*

It is sometimes observed that while an investment tribunal ‘must, if necessary, examine issues of jurisdiction of its own volition, questions of admissibility may only be examined if they are raised by the Parties’.<sup>140</sup> Disputing parties are entitled but not bound to raise admissibility objections.<sup>141</sup> An investment tribunal may find that a party who has failed to raise these objections has ‘acquiesced in any breach of the requirements of admissibility’.<sup>142</sup> Admissibility objections are said to be subject to waiver and acquiescence because ‘no strict jurisdictional system’ is being affected and thus, different from the case of jurisdictional objections, ‘party autonomy should normally prevail over systemic considerations’.<sup>143</sup> Others, however, have doubted some of the proposed criteria to distinguish between jurisdiction and admissibility relating to party autonomy.<sup>144</sup> For example as to curability, certain jurisdictional flaws ‘may also be cured through party consent’.<sup>145</sup>

However, the suggestion that it would, in every case, be inappropriate for the investment tribunal itself to raise admissibility questions is questionable.<sup>146</sup> A tribunal should have the power to decline admissibility without the parties raising admissibility objections when its ‘judicial function’ is at stake. As the ICJ confirmed, quoting *Northern Cameroons*, ‘[t]here are inherent limitations on the exercise of the judicial function which the Court, as a court of justice, can never ignore’.<sup>147</sup> These limitations must be enforced even against both disputing parties’ wishes.<sup>148</sup> If a tribunal hears the merits of a claim involving an illegal investment, it may affect its judicial function, even if jurisdiction is unaffected and the parties have not raised the issue.<sup>149</sup> Another instance in which a *sua*

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<sup>140</sup> *Achmea II* [120]. See also Douglas (2009) 141. Waibel is more cautious (‘objections to admissibility can generally be waived’). Waibel (2015) 1274.

<sup>141</sup> *Hochtief* (Jurisdiction) [94].

<sup>142</sup> *Ibid.* See also *ibid* [95].

<sup>143</sup> Salles (2014) 152, 154-155.

<sup>144</sup> Shany (2015) 132-133.

<sup>145</sup> *Ibid.*, 133. See also *ibid.*, 146. On the other hand, Fitzmaurice argued that ‘some pleas of inadmissibility’, i.e., not all, ‘relate to defects that may be cured by the subsequent action of the party concerned’. *Northern Cameroons*, 101 (Sep Op, Fitzmaurice).

<sup>146</sup> See Thirlway (2001) 157. But see Douglas (2009) 141.

<sup>147</sup> *Frontier Dispute* [45].

<sup>148</sup> *Ibid.*

<sup>149</sup> Newcombe (2011) 198-200.

*sponte* admissibility examination may be justified is when legitimate third party interests may be affected by the decision, even if the parties have not filed an objection in that regard.

On the other hand, while investment tribunals may be deemed to possess the inherent power to consider a claim's admissibility even *proprio motu*, admissibility questions are not at the discretion of investment tribunals.<sup>150</sup> When the parties have raised admissibility objections, an investment tribunal may not 'simply disregard the requirement that has not been fulfilled', although it 'enjoys some discretion as to how to deal with its non-fulfillment'.<sup>151</sup>

In contrast to jurisdiction, tribunals enjoy a 'degree of flexibility' in addressing admissibility problems to fashion an appropriate response in light of the circumstances of an inadmissible claim.<sup>152</sup> By contrast, jurisdictional decisions are 'binary' in that jurisdiction is either affirmed or denied.<sup>153</sup> That said, investment tribunals are not free to grant claims that they have found inadmissible or even to decide on their ultimate merits.<sup>154</sup> Further, unlike jurisdiction, which depends on a limited list of relatively objective factors, admissibility may involve a variety of different reasons often interwoven with substantive aspects. This often facilitates dissecting the claim into different elements for purposes of an admissibility analysis and a finding that parts of the claim (rather than the whole claim, let alone the whole case) are inadmissible.<sup>155</sup>

### 3 *Reviewability of decisions*

Authors often observe that there is a difference in the extent to which arbitral tribunals' decisions on jurisdiction, on the one hand, and on admissibility, on the other, may be reviewed by another forum.<sup>156</sup> Paulsson argued that distinguishing between jurisdiction

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<sup>150</sup> De Brabandere (2012) 613; *Abaclat* (Diss Op, Abi-Saab) [18].

<sup>151</sup> *ICS* [256].

<sup>152</sup> For example, through suspending the proceedings for a certain period while the inadmissibility ground is present. See *SGS v Philippines* [163-177]; *Bureau Veritas II* [294].

<sup>153</sup> Newcombe (2011) 199.

<sup>154</sup> Steingruber states that 'in the case of an inadmissible claim/counterclaim the competent Tribunal will dismiss it due to inadmissibility, i.e. the Tribunal will not enter into the merits'. Steingruber (2014) 680. However, since admissibility is often connected to the merits the better view is that tribunals will not decide the merits of inadmissible claims but may consider such merits precisely to render an admissibility decision.

<sup>155</sup> See *Application Genocide Convention II* [120] (an admissibility objection may target the whole case or 'more usually, a specific claim therein').

<sup>156</sup> Walters (2012) 661; Waibel (2015) 1277.

and admissibility is important precisely because of reviewability.<sup>157</sup> Arbitral decisions involving an excess of jurisdiction may be invalidated by a reviewing authority.<sup>158</sup> Conversely, admissibility determinations by a competent tribunal should not be disturbed.<sup>159</sup> However, while certain distinctions may be made in light of the different grounds for review in arbitral rules and the kind of issues typically involved in jurisdictional and admissibility decisions respectively,<sup>160</sup> the difference between the two as concerns reviewability is not fundamental.

Regarding review of arbitral decisions, a distinction must be made between ICSID awards, which are subject to the ICSID annulment process, and non-ICSID awards, which are generally subject to (limited) control by local courts.<sup>161</sup> As to the latter case, the precise scope of local courts' power to review arbitral awards depends on the relevant national law provisions and the effect of any applicable treaty in each domestic legal system. International instruments typically include jurisdictional issues as possible grounds for refusing to recognize and enforce arbitral awards,<sup>162</sup> while admissibility or similar concepts are not expressly mentioned. Yet, the possibility that admissibility decisions may fall in some of the other grounds provided for in these instruments or in national laws cannot be completely excluded.<sup>163</sup>

A similar observation applies with respect to Article 52 of the ICSID Convention, which contains the grounds for annulment of an award rendered by an ICSID tribunal.<sup>164</sup> These grounds include 'that the award has failed to state the reasons on which it is based'.<sup>165</sup> This defect can be present in jurisdictional, admissibility, or merits decisions alike. Further, the ground of manifest excess of powers<sup>166</sup>—some of the most obvious

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<sup>157</sup> Paulsson (2005) 605.

<sup>158</sup> Ibid, 601.

<sup>159</sup> Ibid. But see Walters (2012) 676.

<sup>160</sup> See *Venezuela Holdings (Annulment)* [110] ('questions of admissibility may require to be approached in a different way from questions of jurisdiction' under Article 52 of the ICSID Convention).

<sup>161</sup> Markert and Bubrowski (2015) 1461; Bohmer (2016) 237.

<sup>162</sup> New York Convention, Art V.1(c).

<sup>163</sup> An admissibility decision could, for example, be regarded as 'contrary to the public policy' of the country where recognition and enforcement is sought. Ibid, Art V.2(b). See Walters (2012) 677-678.

<sup>164</sup> ICSID Convention, Art 52(1).

<sup>165</sup> Ibid, Art 52(1)(e).

<sup>166</sup> Ibid, Art 52(1)(b).

examples of this ground being jurisdictional findings<sup>167</sup>—includes a failure by the tribunal to apply the applicable law.<sup>168</sup> Again, such failure can occur in the context of an admissibility decision and thus the decision be subject to review under Article 52 of the ICSID Convention.<sup>169</sup>

## II ADMISSIBILITY CRITERIA RELATING TO STANDING AND THE CAUSE OF ACTION IN SHAREHOLDER CLAIMS

In international investment law, admissibility covers matters such as procedural preconditions,<sup>170</sup> abuse of the treaty regime,<sup>171</sup> or the investor's lack of good faith or failure to comply with the host state's law in making the investment.<sup>172</sup> Admissibility has also been applied or discussed in relation to matters which are the focus here including: i) the interplay between contract claims/contractual remedies and treaty claims/treaty remedies,<sup>173</sup> and ii) shareholder standing to claim for measures taken against the company.<sup>174</sup> Standing refers to the ability to claim in respect of a measure,<sup>175</sup> which depends on whether the claimant's legally protected entitlements have been affected.<sup>176</sup> While standing objections often raise issues different from lack of consent to the forum and thus go to admissibility,<sup>177</sup> when a party does not comply with requirements established in the relevant IIA as to who may claim (for instance, nationality requirements) the defect is jurisdictional.<sup>178</sup> By the same token, if the claim's basis or

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<sup>167</sup> Schreuer (2009) 943.

<sup>168</sup> Shin (2016) 708; Updated ICSID Background Paper, [92-93].

<sup>169</sup> But see Baumgartner (2016) 302 (arguing, without providing reasons, that Article 52 is inapplicable when the claim is dismissed on inadmissibility grounds). See also Wehland (2017) 233-234. De Brabandere, on whom Baumgartner relies, is less categorical. De Brabandere (2012) 618 (admissibility decisions 'are, even under the ICSID Convention, unlikely to be subjected to annulment').

<sup>170</sup> *ICS* [252-262]; *Daimler*, [184-194].

<sup>171</sup> *Tidewater* (Jurisdiction) [198]; *Philip Morris v Australia* [588]. But see *Transglobal* [118] (finding that an abuse of the investment treaty system affects jurisdiction).

<sup>172</sup> Newcombe (2011) 198; De Brabandere (2012) 614; *Vanessa* (Award) [125].

<sup>173</sup> Gaffney and Loftis (2007) 29; *SGS v Philippines* [154, 160-164]; *Hochtief* (Liability) [187-194].

<sup>174</sup> Douglas (2009) Ch 11; Waibel (2015) 1273; *Enron* (Jurisdiction I) [52]; *HICEE* [147].

<sup>175</sup> In international law, the term 'measure' includes 'any act, step or proceeding' with 'no particular limit on their material content or on the aim pursued thereby'. *Fisheries Jurisdiction* [66].

<sup>176</sup> Tams (2005) 29.

<sup>177</sup> Waibel (2015) 1284-1286; Wehland (2017) 239.

<sup>178</sup> Paulsson (2005) 616; *Georgia v Russia* [115-184].

cause of action, i.e., the rights whose breach the claim alleges,<sup>179</sup> is not included in the IIA's jurisdiction provision, the problem is also jurisdictional.<sup>180</sup>

Yet the thesis does not focus on whether shareholders' IIA rights or interests may have been affected and whether, consequently, shareholders can bring treaty claims.<sup>181</sup> Rather, the admissibility question here is how to reconcile shareholder treaty claims and company claims involving the same damages, in circumstances in which all jurisdictional requirements are assumed to be present (including that the shareholder is invoking its own treaty rights and advancing a genuine treaty claim). However, discussion of the standing and cause of action aspects of shareholder treaty claims is necessary, on the one hand, to consider to what extent current ideas on independence of shareholder rights and treaty claims have prevented us from acknowledging claim duplication. On the other hand, it is necessary because one may acknowledge both the existence of overlaps and the fact that different persons, relying on rights with a different legal basis, are often involved in related treaty and contract claims. Indeed, the thesis deals with the coexistence in international investment law of different holders of rights and interests over the same assets and of ensuing claims arising under national and international legal regimes.

Standing, cause of action, and damages aspects of overlapping claims are the subject of Chapters 4, 5, and 6. For now, criteria relevant to the admissibility of shareholder IIA claims are advanced here. The criteria are not meant to be exhaustive as to the factors investment tribunals may take into account. Nor do these criteria provide, either singly or in combination, *a priori* definitive answers.<sup>182</sup> Yet they are meant to provide a toolbox for investment tribunals to determine the admissibility of shareholder claims for measures against the company or its assets. The main purpose is to avoid or minimize risks of multiple recovery and prejudice to third parties (as well as connected problems of inconsistent decisions and inadequate application of the applicable law). The seven admissibility criteria (the first two being the most important) are:

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<sup>179</sup> Cremades and Cairns (2005) 14; Hobér (2014) 368. The cause of action includes the rights invoked and the facts constituting the alleged breach. See *The Tatry* [39]; *Mærsk Olie & Gas* [38].

<sup>180</sup> See Paulsson (2005) 616; Chapter 7.

<sup>181</sup> In the sense of the 'definitive activation of an arbitration procedure'. *Apotex I* [301] (quoting *Feldman v Mexico*).

<sup>182</sup> This is essentially because deciding on matters such as 'the relationship between the BIT-related arbitration agreement and the local dispute resolution mechanism' is necessarily fact-specific. Kreindler (2005) 191.

i) Is there a substantive overlap between the shareholder treaty claim and contract/national law claims, in that the damages are the same?<sup>183</sup> This is the first criterion and the basic question.<sup>184</sup> If there is no actual or potential duplication of damages, shareholder claims may still risk contradictory decisions through related proceedings. But the risk of multiple recovery and prejudice to third parties as identified above will not be present. The remaining six criteria are premised on such duplication.

ii) Are both the shareholder and the company able to effectively claim for the damages? The answer depends, first, on whether there is a non-IIA venue with jurisdiction over the company's claim,<sup>185</sup> which constitutes an adequate alternative forum in terms of the availability of meaningful relief, respect for due process, and freedom from interference by the host state.<sup>186</sup> Secondly, on whether the company is legally and factually able to pursue its claim.<sup>187</sup> If the answer to either of these questions is no, either the chances of double recovery range from low to non-existent or the alternative forum does not otherwise call into question the admissibility of the shareholder claim.<sup>188</sup>

iii) Have the company or shareholders advanced claims before a non-IIA jurisdiction, even if under national law, involving the same damages as the shareholder IIA claim? This is not to suggest a 'rigid first-in-time rule',<sup>189</sup> particularly if the non-IIA proceedings

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<sup>183</sup> Another relevant criterion to establish substantive duplication is whether the claims derive from the same measures. Crivellaro (2005) 116; *Waste Management I*, 235-236. However, the ultimate test should focus on the damages because the same measure may harm different parties separately. For example, an expropriated asset may be owned jointly by the company and a shareholder and thus the expropriation affect both directly.

<sup>184</sup> Determining whether a shareholder IIA claim involves the same damages that may be claimed by the company is not always a straightforward question. See Chapter 5.

<sup>185</sup> The absence of an alternative forum is advanced here as an admissibility consideration. Whether this factor may be taken into account to decide whether an investment tribunal has jurisdiction is a different question. See *Urbaser* (Jurisdiction) [202].

<sup>186</sup> See Hobér (2014) 243; Wehland (2016) 584; Resolution IDI (2003), [2(a)]; ILA Lis Pendens Report [5.13.5].

<sup>187</sup> In *Barcelona Traction*, the ICJ required that the company had legally ceased to exist for the shareholders to be able to claim for injury to the company. *Barcelona Traction* (Second Phase) [66]. See also ILC Draft Articles on Diplomatic Protection, Art 11(a). But this was in the context of general international law, where the principle was and remains that shareholders cannot claim for harm to the company. As an admissibility criterion for shareholder IIA claims, the test should be less stringent since, under certain IIA provisions, shareholders may be able to claim for damage to the company's assets. See Chapter 4.

<sup>188</sup> An international tribunal should not 'allow its own competency to give way' when there is 'a danger of a denial of justice'. *Chorzów Factory* (Jurisdiction), 30. Paulsson termed a refusal of the right of access to courts 'the most obvious form of denial of justice'. Paulsson (2005-II) fn 134.

<sup>189</sup> McLachlan opposes a strict 'first seised' requirement because it may promote a race to commence proceedings and instances of abuse of right in forum selection. But while in cases of litispendence both courts should take account of the parallel proceedings, when one court is considering a stay 'there must be

were lodged to frustrate or otherwise affect the IIA claim,<sup>190</sup> but that the investment tribunal take the existence of prior overlapping proceedings into account.<sup>191</sup> However, here certain additional factors are also relevant: (1) Does the first seized court constitute an adequate alternative forum in the terms described in criterion ii)?; (2) Was the shareholder in a position to influence the bringing or prosecution of the preceding non-IIA claim in that, for example, it controls the company who is the claimant in such claim? If so, did the company have a legal obligation or some other compelling reason to file the non-IIA claim?

iv) Do the treaty claims advanced rely, expressly or impliedly, on contract breaches and involve the same damages as those that may be claimed in respect of such breaches? If the answer is yes, have the parties to the contract chosen a specific jurisdiction to deal with the contract breaches in question that differs from the IIA tribunal and constitutes an adequate alternative forum as described above?

v) Notwithstanding the existence of prior overlapping proceedings or an exclusive forum selection clause applicable to the same damages, is the investment tribunal in a position to adopt measures to effectively address the risk of multiple recovery that may stem from granting compensation to the shareholder? Otherwise, is it realistic in the circumstances to expect that the non IIA-forum<sup>192</sup> will take into account whatever compensation the IIA tribunal grants, particularly in light of the powers such forum may have under its applicable law?

vi) If there are reasonable prospects that the non-IIA forum can avoid double recovery through deducting the compensation granted to the shareholder, will the interests of

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a prior pending proceeding actually on foot before another tribunal. Otherwise, the grant of a stay may perpetrate a denial of justice.’ McLachlan (2008) 334, 467, 500. See also *Ampal* (Jurisdiction) [333].

<sup>190</sup> See Resolution IDI (2003), [4].

<sup>191</sup> Orrego Vicuña (2005) 211; ILA Lis Pendens Report [5.10]. In *Prince von Pless Administration*, Germany alleged violations of the Geneva Convention of 15 May 1922 through Poland’s application of its tax laws to the Prince Von Pless. The PCIJ stated it would be advantageous ‘as regards the points which [had] to be established in the case, to be acquainted with the final decisions of the Supreme Polish Administrative Tribunal upon the appeals brought by the Prince von Pless’. The PCIJ then ‘arrange[d] its procedure so as to ensure that this [would] be possible’, although the case was later withdrawn before the Court ruled on jurisdiction, admissibility, and merits (which had all been joined). *Prince von Pless Administration* (Order of 4 February 1933), 11-12, 16.

<sup>192</sup> While this expectation generally alludes to a subsequent judicial decision, investment tribunals have also referred to government negotiators or regulators as the ones left to deal with possible double recovery effects. See Chapter 5.



parties not involved in the IIA claim be negatively affected as a consequence?<sup>193</sup> If so, can the investment tribunal adopt measures to address possible impacts on third parties?

vii) Have the non-IIA claims involving the same damages as the shareholder IIA claims been waived or settled, either by the company or the shareholder itself? If the company granted the waiver or reached a settlement, did the shareholder have any say in the decision<sup>194</sup> or otherwise accept the waiver or settlement (for example, because the waiver was already included in provisions applicable to the investment before the shareholder invested)?

In principle, the first two criteria are conclusive. If there is no overlap in the damages claimed or if there is an overlap but no alternative adequate forum, shareholder IIA claims are admissible. This is because there is either no risk of double recovery or the alternative forum presents certain defects (such as absence of effective remedies or due process) that would make a finding of inadmissibility unjustified and unfair.<sup>195</sup> Similarly, a settlement or waiver that the shareholder granted or accepted should weigh heavily against the admissibility of a shareholder claim based on damages covered by the settlement or waiver. As in *Hochtief*, waivers in contracts (or settlements) may be broad enough to cover both contract and treaty claims.<sup>196</sup> If the settlement or waiver expressly refers only to claims under the contract, shareholder treaty claims may well be admissible.<sup>197</sup> Still, allowing the shareholder to bypass the effects of a settlement or waiver, which was part of the contractual bargain, simply by claiming for the same damages through a treaty claim is problematic.

On the other hand, the existence of previously commenced overlapping non-IIA proceedings or exclusive forum selection clauses in contracts are advanced as relevant but not decisive considerations. The requirement that the non-IIA proceedings precede

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<sup>193</sup> See Douglas (2009) 457 (advancing as admissibility considerations applicable to shareholder indirect claims whether the claim will prejudice third parties or ‘interfere with a fair distribution of the recovery among all interested parties’).

<sup>194</sup> See *Orascom* [523].

<sup>195</sup> Brower and Henin stressed the need for investment tribunals to reach a ‘substantively fair outcome’. Brower and Henin (2015) 65.

<sup>196</sup> *Hochtief* (Liability) [189-192].

<sup>197</sup> A similar reasoning applies when there has been a settlement of a claim under an IIA and then the same damages are invoked against the host state under a different IIA. *Orascom* [525]. Admittedly, however, the application of principles on abandonment of claims through unilateral acts of waiver or acquiescence implied from conduct, or by agreement in the field of investment arbitration, is ‘an open question’. Crawford-Brownlie (2012) 700.

the filing of the shareholder IIA claim is consistent with general principles on *lis pendens*.<sup>198</sup> By contrast, the relevance of whether a contractual choice of forum precedes the entry into force of the relevant IIA is less clear. As such, ‘the *lex posterior* principle only applies as between instruments of the same legal character’.<sup>199</sup> For admissibility purposes, however, when the different instruments were concluded, coupled with arguments about *lex specialis* relationships between such instruments,<sup>200</sup> may be relevant to determine, for example, that the investor agreed to a non-IIA forum when the IIA one was already available. Further, the effect of overlapping non-IIA proceedings and contractual forum selection clauses as admissibility grounds should not be assessed in isolation. Rather, these factors should be weighed against the actual prospects of double recovery and prejudice to third parties and of the investment tribunal’s ability to adopt measures to exclude or mitigate these risks.

### III CONCLUSION

Admissibility of claims is an established idea in international law.<sup>201</sup> Yet, even if featuring in the ICJ’s Rules of Court, there is no precise and generally accepted definition of admissibility.<sup>202</sup> Its limits vis-à-vis jurisdiction and the merits of international claims are not fixed or easy to draw.<sup>203</sup> In international investment law, the concept of admissibility of claims is no more precise than in general international law.<sup>204</sup> To this one should add the general absence of provisions either in arbitral rules or in IIAs referring to substantive

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<sup>198</sup> *Certain German Interests* (Preliminary Objections), 19-20; Shany (2003) 157; Reinisch (2004) 43-44. Wehland argues that ‘an application of the principles of *lis pendens* and *res judicata* would not be appropriate [as regards treaty and contract proceedings] since the treaty tribunal is hierarchically superior to the contractual forum’. Wehland (2016) 585. Yet this reasoning would not prevent an investment tribunal from taking into account, for admissibility purposes, that the non-IIA proceedings were commenced first.

<sup>199</sup> *SGS v Philippines* [142]. But see Kreindler (2005) 193.

<sup>200</sup> The *SGS v Philippines* tribunal itself stated, quoting Schreuer, that it should not be presumed that a general provision in a treaty ‘has the effect of overriding specific provisions of particular contracts, freely negotiated between the parties’. *SGS v Philippines* [141]. See also *SPP* (Jurisdiction II) [83].

<sup>201</sup> Collier and Lowe (1999) 155-6.

<sup>202</sup> Shany (2015) 1-2.

<sup>203</sup> Thirlway (2001) 73; Newcombe and Paradell (2009) 221.

<sup>204</sup> Waibel (2015) 1214.

admissibility.<sup>205</sup> Notwithstanding, investment tribunals increasingly make admissibility determinations.<sup>206</sup>

A condition is jurisdictional whenever consent to arbitration hinges on it. While this may vary in each case, depending on the consent instruments in question, under IIAs the power to decide essentially depends on the existence of a covered investor, with a protected investment and a *prima facie* claim of treaty breach.<sup>207</sup> Thus, investment tribunals' ability to weigh considerations not related to the existence of state consent in affirming or denying jurisdiction is questionable.<sup>208</sup> By contrast, admissibility conditions do not refer to consent or its scope.<sup>209</sup> Rather, admissibility includes a wide variety of grounds that provide reasons for a tribunal not to hear a claim or to hear it but refrain from adopting a finding on its ultimate merits.<sup>210</sup> Admissibility determinations may, however, involve a consideration of the merits. Yet aside from procedural economy reasons, avoiding a decision on whether the applicable IIA has been breached—and perhaps also, as an incidental matter, whether there has been any violation of a relevant contract—on admissibility grounds, may have other consequences. The chance of inconsistent outcomes vis-à-vis other fora declines.

The admissibility grounds that this thesis proposes principally address two problems that may arise in shareholder IIA claims: the avoidance of multiple recovery and prejudice to third parties. These consequences affect rights and interests protected by the applicable law, which in the case of investment arbitration includes both international and national law.<sup>211</sup> Investment tribunals have the inherent power to find that certain claims are inadmissible, where a finding on the ultimate merits would go against recognized legal principles that aim to ensure no multiple recovery and prejudice to third parties.

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<sup>205</sup> But see e.g. Canada-Peru BIT, Art 37; CETA, Art 8.21(6). After the 2006 amendment, ICSID Arbitration Rule 41(5) regulates an expedited procedure for the parties to raise, as a preliminary objection, that 'a claim is manifestly without legal merit'. This language is broad enough to include admissibility objections. Salles (2014) 104.

<sup>206</sup> See e.g. *Bosh International* [136]; *Teco* [628]; *Flughafen Zürich* [391]; *İçkale* [239-246]; *Kiliç (Annulment)* [166].

<sup>207</sup> Douglas (2009) 143.

<sup>208</sup> *Abaclat* (Diss Op, Abi-Saab) [16].

<sup>209</sup> *Ibid* [18-19].

<sup>210</sup> Waibel (2015) 1219.

<sup>211</sup> *LG&E (Liability)* [96].

The application of admissibility to shareholder claims depends, first, on the existence of a duplication of damages claims (either actual or potential), and second, on the existence of an adequate alternative forum where the overlapping claims are being heard or may be heard. And even then, the thesis advances additional admissibility considerations, related to whether there are real prospects of double recovery and/or prejudice to third parties and whether investment tribunals are in a position to at least reduce these risks. All in all, this requires factoring in both shareholders' IIA rights to be compensated in certain cases and other important considerations, not least preventing the shareholder from being compensated twice for the same damage.

### 3 *Mixed Claims Commissions and the Origins of Central Concepts*

Clearly the high contracting parties had in view the substance and not the shadow of justice.<sup>1</sup>

In applying international law, contemporary investment tribunals regularly consider both treaty provisions and general international law. The origins of customary rules dealing with the protection of foreigners can be traced back to the beginnings of modern international law or even before.<sup>2</sup> But as to certain matters of particular interest here,<sup>3</sup> decisions of *ad hoc* arbitral tribunals and ‘mixed claims commissions’ of the 19th and first half of the 20th centuries have exerted a distinctive influence. This is not surprising. After the ‘renaissance’ of international arbitration with the Jay Treaty of 1794,<sup>4</sup> the main preoccupation of these tribunals and commissions during the 19th century was the diplomatic protection of nationals for damages suffered in a foreign country.<sup>5</sup>

Many claims commissions considered issues directly connected to the standing of shareholders, causes of action under national law (including prominently contracts) and international law, and the entitlement to damages. The opinions of these precursors of modern investment tribunals, however, have to be approached with some caution. Mixed claims commissions and arbitral tribunals operated under specific treaty arrangements, which often differed in significant respects from current IIAs that confer jurisdiction to

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<sup>1</sup> *Orinoco Steamship Company* (Commissioner Bainbridge), 183.

<sup>2</sup> See Paparinskis (2013) 11 (mentioning the discussion on the rules on the treatment of aliens in Giovanni da Legnano’s 1360 treatise). The idea that foreigners may deserve special legal protection is even older. See Plato, *The Laws* 193 (‘As to foreigners, one should regard agreements made with them as particularly sacrosanct. Practically all offences committed as between or against foreigners are quicker to attract the vengeance of God than offences as between fellow-citizens.’).

<sup>3</sup> See *Vivendi I Annulment* [98-101] (citing the decision of the 1903 United States-Venezuela Commission in *Woodruff* for the concept of ‘fundamental basis of the claim’).

<sup>4</sup> *Georges Pinson*, 335; Virally (1987) 82; Hobér (2014) 109. The Jay Treaty is the Treaty of Amity, Commerce and Navigation—the first of its type—concluded on 19 November 1794 between Great Britain and the United States, which sought to maintain peace between the two countries. Ziegler (2013) [1-2].

<sup>5</sup> *Biens Britanniques*, 636.

arbitral tribunals, such as the applicable law.<sup>6</sup> Further, some of the understandings on basic background notions—such as the position of the individual in international law<sup>7</sup>—have evolved significantly since the 19th century.

This chapter discusses findings mainly of the Commissions created between Venezuela and ten other countries in 1903 (‘Venezuelan Commissions’) and of the Commissions constituted by Mexico with France, Germany, Great Britain, Italy, Spain, and the US and that functioned between 1923 and 1934 (‘Mexican Commissions’).<sup>8</sup> These two groups of Commissions in particular have influenced modern investment tribunals.<sup>9</sup> Decisions of other claims commissions and *ad hoc* tribunals are incidentally discussed, when necessary to refer to the position preceding the Venezuelan and Mexican Commissions or to consider legal developments contemporaneous to these Commissions. The focus here is on early antecedents of current ideas on shareholder standing, causes of action, and damages.<sup>10</sup> A consideration of these concepts’ original scope contributes to a critical appraisal of their current functions,<sup>11</sup> allowing for the (sometimes important) differences in context. This chapter argues that, when applying them, past commissions were more concerned with the fairness of the ultimate outcome than with formal

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<sup>6</sup> The difference as to the applicable law should not be overstated, however. Regarding the 1923 Mexico-United States Special Claims Convention’s reference that Mexico’s responsibility would not ‘be fixed according to the generally accepted rules and principles of international law’, Feller noted that ‘the Commissions proceeded on the view that “equity” was to be restricted to the decisions of the question of Mexico’s responsibility, and that as to all other questions the rules of international law were to be applied’. Feller (1935) 223. Those ‘other questions’ included ‘the admissibility of corporate claims’. Ibid. See also Phillips (1933) 228; Percival (1937) 99-100. But see Schwarzenberger (1957) 201.

<sup>7</sup> In 1932, Witenberg argued that admissibility grounds could not result from a contract because the only possible source of these grounds was international law. Witenberg (1932) 62. However, this would be different if ‘the individual would acquire international personality’. Ibid. Author’s translation (original French). See also Borchard (1915) 16; Verdross (1931) 328-329.

<sup>8</sup> Ibid, vii, 23. Both Mexico and Venezuela were parties to several other treaties constituting claims commissions, in particular during the 19th century. Dolzer (2011) [6-7].

<sup>9</sup> Modern references to the Venezuelan Commissions’ decisions include *Santa Elena* [98], *Vivendi II Award* [7.5.18], and *Micula*, fn 13. As to the Mexican Commissions, a well-known example is the influence of the decision in *Neer* on current debates on the international minimum standard of treatment. See *ADF* [179]; *Gami* [95]; *Glamis* [22]; *Azurix* (Award) [365-368]; *El Paso* [347]; *Railroad* [216-218]; *Gold Reserve* [567]; Sharpe (2016) 279. See also *Saur* (Liability) [493]; *OI* [486] (arguing that the relevant decision on the minimum standard is not *Neer* but *Roberts*); *Arif* [431] (citing the *Chattin* case); Garibaldi (2015) (for a critical discussion of the current influence of the Mexico-US General Claims Commission’s decision in *North American Dredging Company*).

<sup>10</sup> The thesis does not discuss historical references to admissibility because modern investment tribunals have not relied on the case law/documents of claims commissions or old *ad hoc* arbitral tribunals in this regard. Further, certain early discussions, such as Witenberg’s monograph, conflated jurisdictional and admissibility objections. Witenberg (1932) 86. Before claims commissions, the terms jurisdiction and admissibility were also often used to refer to the same objections. See e.g. *Selwyn*, 380.

<sup>11</sup> See Miles (2013) 16.

categories. It contends that the decisions, for the most part, tried to avoid certain undesirable consequences such as the potential for double compensation or prejudice to third parties. While the Commissions did not regard these factors as affecting their jurisdiction, they took them into account as an admissibility consideration in deciding whether to accept claims.

Section I discusses basic features of mixed claims commissions in general and of the Venezuelan and Mexican Commissions. Section II considers, first, the Commissions' reasoning with respect to the relationship between shareholders, on the one hand, and the company and its assets and rights, on the other. The purpose is to distil some general notions on the admissibility of shareholder claims. This section then addresses the relationship between contract claims and claims under international law. It looks at the contract claims/treaty claims distinction in its original context, to reflect on its early functions. Finally, the chapter discusses damages concepts connected to standing and the cause of action and that have a bearing on the admissibility of shareholder claims.

## I MIXED CLAIMS COMMISSIONS

Some of the principal ideas discussed in this thesis, including the contract claims/treaty claims distinction and notions related to shareholder standing in international law, started to develop in the decisions of mixed claims commissions. The context and purposes for which they were used, however, differed from their modern application. First, only states had standing before the commissions. International claims were subject to virtually complete government control. Conversely, investment claims nowadays are generally pursued directly by the investor, with home state intervention foreseen only in exceptional circumstances.<sup>12</sup> Second, the distinction as to the basis of claims mostly concerned claims under contracts and claims under general international law. Currently, the distinction is between contract claims and claims under IIAs. In this light, is mixed claims commissions' jurisprudence still relevant in relation to international investment law? Or has the increased protection provided by IIAs to foreign investments, including their jurisdictional innovations, rendered mixed claims commissions' decisions largely irrelevant, except perhaps for discrete issues such as the minimum standard of treatment?

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<sup>12</sup> See e.g. ICSID Convention, Art 27(1) (excluding diplomatic protection in respect of an ICSID arbitration, except when a 'Contracting State shall have failed to abide by and comply with the award').

The problem the thesis explores is the failure to recognize substantive overlaps between shareholder indirect claims and contract/national law claims and whether this is justified by the new legal landscape created by IIAs. By contrast, mixed claims commissions operated in a world of state-owned claims where, for example, the status of individuals (let alone other private actors) as subjects of international law was doubtful at best.<sup>13</sup> Yet, on the one hand, the commissions also drew a distinction between contract and international law claims. On the other hand, they did not fail to recognize the private interest underlying the state claims and the overlaps between these claims and claims available under contracts. The commissions' jurisdiction, as established by the relevant treaties, was not affected. However, the overlaps and their potential consequences, such as double recovery risks,<sup>14</sup> were an important consideration in resolving the claims' substance. For present purposes, the recognition of overlaps between national and international claims and their potential impact on the decisions of international jurisdictions demonstrates the continued relevance of mixed claims commissions.

#### A Mixed claims commissions in general

The terms 'mixed claims commissions' or 'mixed commissions' have been used to refer to a variety of different entities. 'Mixed commissions' can refer to commissions of a very varied nature, ranging from 'diplomatic' commissions with fact-finding or conciliation roles through commissions of a 'judicial' or 'quasi-judicial' nature.<sup>15</sup> The term 'mixed claims commissions' also defies easy definition. Even the institutions to which they are most commonly applied had notable differences among them. Mixed claims commissions also evolved considerably throughout the period in which they were most frequently used, during the 19th and early 20th centuries.<sup>16</sup> They were created by treaties with a view to settling a defined category of disputes,<sup>17</sup> often within a specific timeframe.<sup>18</sup>

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<sup>13</sup> In *International Fisheries*, Nielsen quoted approvingly Oppenheim's view that international law was 'a law for the intercourse of States with one another, not a law for individuals'. *International Fisheries* (Diss Op Nielsen), 722. See also Anzilotti (1906) 8; Rundstein (1928) 340. But see Oppenheim (9<sup>th</sup> ed) 16-22.

<sup>14</sup> Douglas (2009) 419-420.

<sup>15</sup> Boisson de Chazournes and Campanelli (2006) [8-14].

<sup>16</sup> Miles (2013) 67.

<sup>17</sup> Dolzer (2011) [1].

<sup>18</sup> See e.g. Mexico-US Convention of 8 September 1923, Art VI (Commission, in principle, 'bound to hear, examine and decide, within three years from the date of its first meeting, all the claims filed'). RIAA IV, 13. This term was later extended on three occasions. Ibid, 325-326, 549-550, 751-752.



Although the main interest here is in claims for damages suffered by an individual or company at the hands of a foreign country, mixed claims commissions would sometimes resolve other types of disputes, including between the states parties to the treaty.<sup>19</sup> Mixed claims commissions or tribunals<sup>20</sup> were generally set up to deal with a high number of claims arising from traumatic events, such as revolutions or national and international armed conflicts. Measures taken in these circumstances by the state in question were often alleged to constitute expropriations of alien property.<sup>21</sup> Well-known examples of events leading to the creation of claims commissions include the Venezuelan Civil War of 1898-1902, the Mexican Revolution starting in 1910 and lasting around a decade, and the First World War.<sup>22</sup> Losses to foreigners resulting from these events caused significant tensions among states; the creation of *ad hoc* bodies was seen as an inexpensive and effective way to process the resulting claims.<sup>23</sup> Leaving aside the dispute settlement arrangements following the First and Second World Wars, the majority of the claims referred to damages suffered by a national of a more or less powerful state and allegedly attributable to a weaker state, within whose territory the damaging event had taken place.<sup>24</sup>

## B The Venezuelan and Mexican Commissions

### 1 Overview

The mixed claims commissions ‘between Venezuela and ten of the principal nations of the world’, which sat at Caracas from 1903, were described at the time as ‘the most notable instance of international arbitration in the history of the world’.<sup>25</sup> These commissions, whose constitutive instruments were concluded after a blockade of the

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<sup>19</sup> Dolzer (2011) [1].

<sup>20</sup> During the 20th century and in particular following the First World War, some *ad hoc* processes for the resolution of international disputes were called mixed tribunals. Shaw (2008) 1056.

<sup>21</sup> Miles (2013) 67.

<sup>22</sup> Boisson de Chazournes and Campanelli (2006) [10]; Dolzer (2011) [6-7].

<sup>23</sup> Shaw (2008) 1056.

<sup>24</sup> Brownlie-Crawford (2012) 611. The Commissions’ jurisdiction sometimes expressly included only the claims of the more powerful state against the weaker one. See Mexico-United States Special Claims Commission, RIAA IV, 779 (covering only claims of US citizens against Mexico).

<sup>25</sup> Kummerow, 392.

Venezuelan ports by Great Britain, Germany, and Italy,<sup>26</sup> were formed to deal with claims of nationals of these three countries and of the US, Mexico, Spain, France, Belgium, the Netherlands, and the Kingdom of Sweden and Norway.<sup>27</sup> All the commissions had the same structure, with Venezuela appointing one member, the other state party appointing another one, and an umpire appointed by a third state.<sup>28</sup> The task of naming the umpire was entrusted to the Queen of the Netherlands (Commissions with the US, Belgium, and France), the President of the US (Commissions with Great Britain, Germany, Italy, and the Netherlands), the King of Spain (Commissions with Mexico and Sweden-Norway), and the President of Mexico (Spain-Venezuela Commission).<sup>29</sup>

The Mexican Commissions were set up essentially to deal with claims arising from the Mexican revolutionary period of 1910 to 1920,<sup>30</sup> between Mexico and France, Germany, Great Britain, Italy, Spain, and the US.<sup>31</sup> In the case of the US, aside from the commission dealing with ‘revolutionary claims’—named the ‘Special Claims Commission’—another commission was set up to deal with all other claims of citizens of both Mexico and the US corresponding to the period 1868 to 1927 (‘General Claims Commission’).<sup>32</sup> The arrangement on the selection of the members of all these commissions was identical. Mexico and the other state each appointed one member and the third member, who would preside over the commission, was selected by mutual agreement.<sup>33</sup> In the absence of agreement, the third member would be designated by an organ of the Permanent Court of Arbitration.<sup>34</sup>

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<sup>26</sup> Drago (1907) 692, 703-704. Germany, Great Britain, and Italy enjoyed a privileged position as regards the payment of their claims vis-à-vis the other states with claims against Venezuela. See *The Venezuelan Preferential Case*.

<sup>27</sup> RIAA IX, 103.

<sup>28</sup> RIAA IX, 115 (US); RIAA IX, 321 (Belgium); RIAA X, 3 (France); RIAA X, 360 (Germany); RIAA IX, 351 (Great Britain); RIAA X, 480 (Italy); RIAA X, 695 (Mexico); RIAA X, 709 (Netherlands); RIAA X, 737 (Spain); RIAA X, 763 (Sweden and Norway).

<sup>29</sup> Ibid.

<sup>30</sup> RIAA IV, 3.

<sup>31</sup> Feller (1935) 23 (also mentioning a convention of a ‘different character’ concluded with Belgium).

<sup>32</sup> Ibid. See also Percival (1937) 98-99.

<sup>33</sup> RIAA V, 567 (Germany); RIAA V, 313 (France); RIAA V, 7 (Great Britain); RIAA IV, 12 (US General Claims Commission); RIAA IV, 779 (US Special Claims Commission).

<sup>34</sup> Ibid.

The decisions of both the Venezuelan and Mexican Commissions were definitive and binding.<sup>35</sup> The Mexican Commissions, however, constitute a more impartial dispute settlement mechanism than the Venezuelan Commissions.<sup>36</sup> While in the case of the latter the umpire was always appointed by one of the states that had formed commissions with Venezuela, in the case of the Mexican Commissions, failing agreement, the president was chosen by an authority of an international organization. Further, the umpire model of the Venezuelan Commissions meant that the Umpire decided the case when there was disagreement between the other two members. It had ‘the disadvantage of emphasizing the national character of the national commissioners, often resulting in reducing them to the position of mere advocates for their governments’.<sup>37</sup>

## *2 Government claims and underlying private rights*

Even in the case of claims derived from a loss suffered by a natural or legal person, before mixed claims commissions it was usually only the state of the nationality of these persons who had standing. In the case of the Venezuelan Commissions, only the governments could appear before the Commissions,<sup>38</sup> although provision was sometimes made for the injured person or his/her representatives to attend the hearings.<sup>39</sup> Before the Mexican Commissions, it was also exclusively the governments who presented the claims.<sup>40</sup> Yet both the Venezuelan and Mexican Commissions referred to the relationship between the claim—presented by the government—and the underlying rights of the injured national.

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<sup>35</sup> See, e.g., RIAA IX, 115 (US-Venezuela Mixed Claims Commission); RIAA V, 570 (Germany-Mexico Claims Commission). Unlike arbitral tribunals, international commissions not always render binding decisions and are often entrusted to issue non-binding pronouncements. Boisson de Chazournes and Campanelli (2006) [6].

<sup>36</sup> This is so even considering only the formal arrangements and leaving aside the extraordinary historical circumstances in which the Venezuelan Commissions were set up. Cf contention of the British agent in *De Lemos*, 369 (‘This treaty was made under pressure of a blockade. Under such circumstances what is more natural than to find that the blockading power has insisted on its own standard of right?’). See also Miles (2013) 69.

<sup>37</sup> Feller (1933) 40.

<sup>38</sup> RIAA IX, 116 (US), 321-322 (Belgium), 354 (Great Britain); RIAA X, 3 (France), 361 (Germany), 482 (Italy), 695 (Mexico), 710 (Netherlands), 713 (Spain), 764 (Sweden and Norway).

<sup>39</sup> See Rules of the British-Venezuelan Commission, Article XV, RIAA IX, 356; Rules of the Netherlands-Venezuelan Commission, Article XI, RIAA X, 713.

<sup>40</sup> RIAA IV, 12, 780-781, (US); RIAA V, 9 (Great Britain), 314-315 (France), 569 (Germany). This was also true of other claims commissions. See e.g. Tripartite Claims Commission US-Austria-Hungary, RIAA VI, 200; General Claims Commission US-Panama, RIAA VI, 303; Mixed Claims Commission US-Germany, RIAA VII, 14.

In the *Orinoco Steamship Company* case, the US-Venezuela Commission considered a claim for damages arising from the annulment of a concession contract, certain unpaid debts, and losses sustained during the revolution.<sup>41</sup> Venezuela questioned the Commission's jurisdiction because the loss had been suffered by a British corporation, which only later assigned the claim to a US company.<sup>42</sup> The Umpire, who decided the case because the two Commissioners disagreed, rejected the objection essentially based on the language of the treaty.<sup>43</sup> He observed, however, that 'a state is not a claim agent, but only, as the infliction of a wrong upon its citizens in [*sic*] an injury to the state itself, it may secure redress for the injury done to its citizens, and not for the injury done to the citizens of another state'.<sup>44</sup> The US Commissioner stated that a wrong on a state's citizen injured the state itself.<sup>45</sup> In all cases '[t]he vital question [was] whether and to what extent citizens of the United States of America [had] suffered loss or injury'.<sup>46</sup> He and the Umpire agreed that jurisdiction was present. The latter added, however, that the Commission's jurisdiction over claims owned by US citizens had to be recognized, without prejudice to its 'judicial power' to rule on the merits considering the effect certain issues—in the case, the claim's assignment—could have on the parties' rights.<sup>47</sup>

In the *Metzger* case of the Germany-Venezuela Commission, the Commissioner for Venezuela argued that the claim for damages could not be accepted *inter alia* on the grounds that 'the right of action does not survive and pass to the heirs of Metzger'.<sup>48</sup> This was opposed by the German Commissioner, who took the position that the case was not between an individual and Venezuela but involved a claim being put forward by

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<sup>41</sup> *Orinoco Steamship Company*, 191-192.

<sup>42</sup> *Ibid*, 182.

<sup>43</sup> *Ibid*, 192-193.

<sup>44</sup> *Ibid*, 192.

<sup>45</sup> *Ibid*, 182.

<sup>46</sup> *Ibid*, 183.

<sup>47</sup> *Ibid*, 193.

<sup>48</sup> *Metzger*, 418.

Germany.<sup>49</sup> The Umpire found this latter position untenable.<sup>50</sup> The claim before the Commission was ‘not a claim of the German Nation but a claim of an individual’.<sup>51</sup>

In *Parker*, the Mexico-US General Claims Commission was confronted with a claim for debts arising from services rendered to the Mexican Government.<sup>52</sup> In considering a challenge against the nationality of the claim,<sup>53</sup> the Commission held that its 1923 constitutive treaty did not deal with claims owned by the espousing states but by private parties.<sup>54</sup> The treaty even provided for the restitution of properties or rights to such parties in certain cases.<sup>55</sup> Yet, on the one hand, the Commission found that the state’s control over the claim was ‘complete’ and ‘exclusive’, in that the government was at liberty to pursue it or not.<sup>56</sup> On the other hand, however, the Commission affirmed that ‘the private nature of the claim inhere[ed] in it and [was] not lost or destroyed so as to make it the property of the nation’.<sup>57</sup>

This aspect of the claims—i.e., procedural control by the government but with an underlying private interest always present—was also observed by the Mexico-Great Britain Commission. In *Mexican Union Railway*, this Commission had to determine the effect of a Calvo Clause<sup>58</sup>—purporting to subject the company in question and all its activities in Mexico exclusively to Mexican jurisdiction—on its competence.<sup>59</sup> In this context, the Commission stated that the claims before it bore

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<sup>49</sup> Ibid.

<sup>50</sup> Ibid.

<sup>51</sup> Ibid, 419. After stating that it was ‘the claim of an individual’, the Umpire found that the laws of Venezuela were applicable. Ibid.

<sup>52</sup> *Parker*, 36.

<sup>53</sup> Ibid.

<sup>54</sup> Ibid, 37.

<sup>55</sup> Ibid.

<sup>56</sup> Ibid.

<sup>57</sup> Ibid.

<sup>58</sup> Borchard described Calvo Clauses as ‘the incorporation in contracts between the local government and a foreigner of a stipulation by which the foreigner agrees to bring his disputes and differences arising out of the contract before the local courts exclusively, with the further express or implied agreement that he renounces his right to call upon his own government for protection in all matters arising out of the contract’. Borchard (1915) 792. See also Feller (1933) 185; Phillips (1933) 234; Percival (1937) 102.

<sup>59</sup> *Mexican Union Railway*, 117-118.

a mixed character. They [were] public claims in so far as they [were] presented by one Government to another Government. But they [were] private in so far as they aim[ed] at the granting of a financial award to an individual or to a company.’<sup>60</sup>

Similarly, in discussing the Mexico-US Commission’s decisions, Borchard had already noted the mixed character of the claims.<sup>61</sup> Thus, the suggestion that the private character of the claim disappeared was not accurate.<sup>62</sup>

The Venezuelan and Mexican Commissions’ views on the nature of the claims and the precise relationship between the state’s rights and those of its injured national appear not wholly articulated or consistent.<sup>63</sup> This is not surprising given the complexity of the issue and the doubts that remain even today on closely related aspects. For present purposes, however, it may be noted that despite the absolute procedural control by governments and the idea of an injury to the latter’s rights,<sup>64</sup> the Commissions did not fail to acknowledge the presence of an underlying private interest.<sup>65</sup> This meant looking at the substance of the claims, even though the private person did not directly appear before the Commissions. Preponderant considerations in this regard included that the private party was the one who had suffered the damage and was the potential beneficiary of any compensation or restitution. Furthermore, the Conventions creating the Mexican Commissions explicitly regarded ‘the result of the proceedings of the Commission as a full, perfect and final settlement’ of each claim, which were owned by natural and legal persons.<sup>66</sup>

### *3 Relationship to national proceedings*

Neither the treaties creating the Venezuelan Commissions nor those creating the Mexican Commissions contained detailed provisions governing the relationship between the

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<sup>60</sup> Ibid, 120.

<sup>61</sup> Borchard (1926) 540.

<sup>62</sup> Ibid. Borchard’s views on this issue seem to have evolved however. See Borchard (1915) 360.

<sup>63</sup> See *Fabiani*, 127 (‘The right to intervene exists in the indignity to France through her national. Thenceforward it is national interests, not private interests, that are to be safeguarded’).

<sup>64</sup> See Feller (1933) 87.

<sup>65</sup> See the opinion of the US Commissioner in *Rudloff*, 245 (‘[T]he arbitration is between nations and the submission concerns a private claim. Only the Government of the claimant, acting in his behalf, enters into the agreement for arbitration.’).

<sup>66</sup> RIAA IV, 11, 13 (US-Mexico General Claims Commission); RIAA IV, 779, 781 (US-Mexico Special Claims Commission); RIAA V, 568, 570 (Germany); RIAA V, 314-316 (France); RIAA V, 8, 10 (Great Britain).

Commissions and national tribunals having jurisdiction over the same or related claims. In the case of the Mexican Commissions, however, it was expressly provided that claims would not ‘be disallowed or rejected by the Commission by the application of the general principle of international law that the legal remedies must be exhausted as a condition precedent to the validity or allowance of any claim’.<sup>67</sup> The reason for this was the desire to effect ‘an equitable settlement of the claims’ and to grant the affected foreigners ‘just and adequate compensation for their losses or damages’.<sup>68</sup>

One of the leading pronouncements on the jurisdictional relationship between international arbitral tribunals and national courts was rendered by the Umpire of the United Kingdom-Venezuela Commission in *Selwyn*. The claim related to a deprivation of ‘valuable rights, of moneys, properties, property, and rights of property’ by Venezuela.<sup>69</sup> Venezuela objected to the Commission’s jurisdiction on the ground that if the claim was ‘admissible otherwise, it [was] barred by the fact that a suit [was] pending in the local courts, wherein the claimant [was] the plaintiff and Venezuela [was] the defendant, based upon the same right of action’.<sup>70</sup> The Umpire observed:

International arbitration is not affected jurisdictionally by the fact that the same question is in the courts of one of the nations. Such international tribunal has power to act without reference thereto, and if judgment has been pronounced by such court, to disregard the same so far as it affects the indemnity to the individual, and has power to make an award in addition thereto or in aid thereof as in the given case justice may require.

Within the limits prescribed by the convention constituting it the parties have created a tribunal superior to the local courts.<sup>71</sup>

The international tribunal will have jurisdiction over a claim even if the same claim is pending before a national court or has already been decided by it.<sup>72</sup>

The idea that even if the ‘same claim’ is already before a national court the international body’s jurisdiction—if warranted under the applicable treaty—is not affected

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<sup>67</sup> RIAA IV, 13, 781, (US); RIAA V, 9 (Great Britain), 315 (France), 569 (Germany).

<sup>68</sup> Ibid.

<sup>69</sup> *Selwyn*, 383.

<sup>70</sup> Ibid, 380.

<sup>71</sup> Ibid, 381. On the primacy of international jurisdictions over domestic courts see also *Différend S.A.I.M.I.*, 45; Schreuer (1976) 508-509; Reichert (1992) 250; Crivellaro (2005) 95 (citing *Socaciu v Austria*); Voss (2011) 303.

<sup>72</sup> *Selwyn*, 381.

was also advanced by the US-Venezuela Commission in *Rudloff*.<sup>73</sup> Here, as in *Selwyn*,<sup>74</sup> the Commission emphasized the need to fulfil the jurisdictional mandate contained in the applicable treaty, notwithstanding competing national jurisdictions.<sup>75</sup> The Italy-Venezuela Commission went further by stating, in *Martini*, that Italy and Venezuela had agreed to substitute ‘for national forums, which, with or without contract between the parties, may have had jurisdiction over the subject-matter, an international forum, to whose determination they fully agree[d] to bow’.<sup>76</sup> The position that when a claim is submitted to arbitration all other competent jurisdictions are ‘set aside and superseded by the jurisdiction of the arbitral tribunal’ was also advanced by the British agent in *De Lemos*<sup>77</sup> and *Aroa Mines*<sup>78</sup> and by the US Commissioner in *Orinoco Steamship Company*.<sup>79</sup> The latter added that in relation to every claim covered by the treaty the role of the US-Venezuela Commission was ‘not fulfilled until to its careful examination there is added an impartial decision upon its merits’.<sup>80</sup>

In *Caire*, the France-Mexico Commission’s Presiding Commissioner decided on a claim derived from the murder of Jean-Baptiste Caire in 1914 by members of armed forces then in control of Mexican territory.<sup>81</sup> Mexico objected to the Commission entertaining the claim until the claimants had withdrawn their claim before national organs.<sup>82</sup> The Presiding Commissioner rejected the objection essentially on the ground that ‘international law does not require an international tribunal to abstain... from entertaining an international dispute, because the same dispute is pending before another

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<sup>73</sup> *Rudloff*, 254-255.

<sup>74</sup> *Selwyn*, 381. Based on the language of one of its constitutive treaties, the United Kingdom-Venezuela Commission observed that ‘[i]t would seem that the claim being otherwise admissible at the time of the making of the treaty, it is not to be affected by anything save its subsequent payment or satisfaction.’ *Ibid*.

<sup>75</sup> *Rudloff*, 255.

<sup>76</sup> *Martini*, 663.

<sup>77</sup> *De Lemos*, 370.

<sup>78</sup> *Aroa Mines*, 405.

<sup>79</sup> *Orinoco Steamship Company*, 183.

<sup>80</sup> *Ibid*.

<sup>81</sup> *Caire*, 517-518.

<sup>82</sup> *Ibid*, 520.



tribunal'.<sup>83</sup> Mexico's litispendence objection<sup>84</sup> related to the claim's admissibility, which the Commission could only decide once it had affirmed its jurisdiction based on the claimant's French nationality.<sup>85</sup> In rejecting the objection and affirming the admissibility of the claim, the Presiding Commissioner noted the promise by France to withdraw any claim before the national forum.<sup>86</sup>

In cases where the relevant international commission's jurisdiction was seen as displacing that of the competent national courts,<sup>87</sup> local proceedings involving the same claims as the international proceedings are hard to reconcile with the applicable treaties.<sup>88</sup> More importantly, the leading case states that national proceedings on the same questions do not affect international arbitration 'jurisdictionally'.<sup>89</sup> An international jurisdiction is 'superior to local courts' and its competence is in any case not affected by the existence or the outcome of national proceedings. But an arbitral tribunal is not barred from taking into account a national decision on the same question and from 'mak[ing] an award in addition thereto or in aid thereof as in the given case justice may require'.<sup>90</sup> Other aspects, such as whether local proceedings involving the same claim will be continued or have resulted in an award of compensation,<sup>91</sup> may be relevant considerations in deciding on the admissibility of the claim.<sup>92</sup>

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<sup>83</sup> Ibid. Author's translation (original French). The Presiding Commissioner, however, expressly reserved cases where there were preliminary questions of national law pending before national courts which resolution would be of decisive importance for the claim before the international commission (such as whether the claimant owned a certain asset). Ibid, 525.

<sup>84</sup> See Reichert (1992) 250; Reinisch (2004) 49.

<sup>85</sup> Ibid, 521. Author's translation (original French).

<sup>86</sup> Ibid, 525.

<sup>87</sup> In many cases, however, this is far from obvious. Schreuer (1976) 518-519.

<sup>88</sup> See *Orinoco Steamship Company II*, 239 (stating that 'the maintenance of Venezuelan Jurisdiction with regard to [the claims submitted to the US-Venezuela Commission] would have been incompatible and irreconcilable with the arbitration which had been instituted').

<sup>89</sup> *Selwyn*, 381.

<sup>90</sup> Ibid.

<sup>91</sup> While not expressly referring to admissibility, the Mexico-United Kingdom Commission in *The Santa Rosa* noted that one of the claims before it had been lodged with a national commission but 'no award ha[d] been made in favour of the Company, nor ha[d] the Company received compensation from any other source'. *The Santa Rosa*, 253.

<sup>92</sup> *Caire*, 525.

#### 4 *Applicable law*

In the case of the Venezuelan Commissions, the commissioners and the umpire were to ‘examine and impartially decide, according to justice and the provisions of [the applicable treaty], all claims submitted to them’.<sup>93</sup> It was further provided that all claims would be decided ‘upon a basis of absolute equity, without regard to objections of a technical nature, or of the provisions of local legislation’.<sup>94</sup> As regards the Mexican Commissions, the Mexico-US General Claims Commission was to decide the claims ‘in accordance with the principles of international law, justice and equity’.<sup>95</sup> But in the case of the special commissions dealing with the ‘revolutionary claims’, Mexico expressed the desire that its responsibility not ‘be fixed according to the generally accepted rules and principles of international law’, although it felt ‘morally bound to make full indemnification’.<sup>96</sup> Thus, these special commissions were to base their decisions on ‘principles of justice and equity’<sup>97</sup> or simply ‘principles of equity’.<sup>98</sup>

The decisions of the Venezuelan and Mexican Commissions generally did not contain a detailed discussion of the applicable law. In *Aroa Mines*, however, the Umpire of the Great Britain-Venezuela Commission stated that, although the constitutive treaties did not refer to international law,<sup>99</sup> the latter was the law of the tribunal and regulated every act under the treaties.<sup>100</sup> It was then

scarcely necessary to say that the protocols [were] to be interpreted and this tribunal governed by [international law], for there is no other; and that justice and equity are invoked and are to be paramount is not in conflict with this position, for international law is assumed to conform to justice and to be inspired by the principles of equity.<sup>101</sup>

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<sup>93</sup> RIAA IX, 115 (US), 321 (Belgium), 353 (Great Britain); RIAA X, 3 (France), 361 (Germany), 481-482 (Italy), 695 (Mexico), 709 (Netherlands), 737 (Spain), 763 (Sweden and Norway).

<sup>94</sup> Ibid. In the case of Great Britain and Germany, Venezuela recognized ‘in principle the justice of the claims’, which had been advanced by those two states on behalf of their subjects. RIAA IX, 351 (Great Britain); RIAA X, 359 (Germany).

<sup>95</sup> RIAA IV, 12.

<sup>96</sup> RIAA IV, 780 (US).

<sup>97</sup> RIAA IV, 780 (US); RIAA V, 8 (Great Britain).

<sup>98</sup> RIAA V, 314, 318 (France), 568 (Germany).

<sup>99</sup> *Aroa Mines*, 444.

<sup>100</sup> Ibid.

<sup>101</sup> Ibid.

The Germany-Venezuela Commission in *Kummerow*, while accepting the application of the principles of international law,<sup>102</sup> also recognized the function of national law in the determination of property rights:

This right of property or title must be decided by municipal or local law, because it is derived from and is conferred by that law. One does not derive his title to property in any country through international law, but through the local law of the country. That law confers, permeates, and restricts his title.<sup>103</sup>

This meant that title to property was subject to ‘any and all the qualifications and limitations’ stemming from national law at the time of its acquisition.<sup>104</sup>

The Mexico-US General Claims Commission had to apply international law.<sup>105</sup> In *North American Dredging Company*, it considered whether a Calvo Clause in the relevant contract was consistent with international law.<sup>106</sup> The Commission noted that it was clear at the time ‘as it was in the day of the Geneva Arbitration that international law is paramount to decrees of nations and to municipal law’.<sup>107</sup> But, importantly, the Commission added that its task was to determine whether a conflict between international law and national legislative or contractual provisions actually existed.<sup>108</sup> Regarding national law before the Commission, US Commissioner Nielsen described national law’s role in a manner not dissimilar to the Germany-Venezuela Commission’s views in *Kummerow*. In *Cook*, he posited that before an international tribunal the nature of contractual and property rights was ‘determined by the local law that governs the legal

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<sup>102</sup> *Kummerow*, 400.

<sup>103</sup> *Ibid*, 399.

<sup>104</sup> *Ibid*, 399.

<sup>105</sup> RIAA IV, 12.

<sup>106</sup> *North American Dredging Company*, 28.

<sup>107</sup> *Ibid*. The reference here is to the *Alabama Claims* arbitration, which is typically cited in support of the primacy of international law over national law. See *Alabama Claims*, 131. For an earlier decision upholding the principle see *Award rendered by Senate of the Free City of Hamburg*, 65.

<sup>108</sup> *North American Dredging Company*, 28. Although the decision was rendered in 1926, the Commission denied ‘that the rules of international public law apply only to nations and that individuals can not under any circumstances have a personal standing under it.’ *Ibid*.

effects of the contract or other form of instrument creating such rights'.<sup>109</sup> Yet state responsibility was exclusively determined by international law.<sup>110</sup>

To distil relevant principles on the admissibility of investment claims, an exhaustive analysis of the applicable law before the Venezuelan and Mexican Commissions is not necessary. The applicable law is usually dependent on the provisions of the treaty governing each commission or arbitral tribunal. The Commissions operated in a field of frequent and complex interaction between treaties and general international law and between international law and national law. In Fehr's words relating to the US-Mexico Commission, certain decisions showed there were 'questions of domestic law with which an international tribunal must deal before it can ultimately determine responsibility on the part of a nation under international law'.<sup>111</sup> Importantly for present purposes, the Commissions often recognized that national law had a significant and sometimes even indispensable function<sup>112</sup> to fulfil before these Commissions.<sup>113</sup>

## II SHAREHOLDER STANDING, CAUSES OF ACTION, AND DAMAGES BEFORE CLAIMS COMMISSIONS

Claims commissions frequently discussed matters relevant to this thesis, including shareholder standing to claim for harm suffered by the company and the coexistence of related national and international claims. To a certain extent, the discussions were determined by the applicable treaty frameworks, which differ in several respects from IIAs. However, some of the ideas discussed by claims commissions have influenced modern international investment law, such as the idea of the 'fundamental basis of the

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<sup>109</sup> *Cook*, 215. In *Cook II*, Nielsen stated: 'Any rights Cook has under the contract are therefore determined by Mexican law. If he had no rights, it is of course unnecessary to proceed to the question whether in the light of any principle or rule of international law such rights were infringed.' *Cook II*, 508. Other arbitral tribunals of the first decades of the 20th century also recognized the pertinence of national law, as an 'incidental' matter, for determining the existence of property rights. See *Affaire des forêts du Rhodope central* (Fond), 1419. See also Fehr (1928) 313.

<sup>110</sup> *Cook*, 215.

<sup>111</sup> Fehr (1928) 315.

<sup>112</sup> In *Orinoco Steamship Company*, the US-Venezuela Commission's Umpire stated that the provision that all claims would be decided 'upon a basis of absolute equity, without regard to objections of a technical nature, or of the provisions of local legislation' meant that 'the provisions of local legislation should not be taken into regard when there were objections against the rules of absolute equity'. *Orinoco Steamship Company*, 200. But as to issues such as nationality, national law had to be considered since otherwise 'the fulfilling of the task of this Commission [was] an impossibility'. *Ibid.*

<sup>113</sup> Prior commissions often appeared less open to considering national law. See *Pacific Mail Steamship Company*, 118 ('purely municipal question[s]' had to be decided by national tribunals).

claim'. Yet other concepts common among contemporary investment tribunals, such as the 'independence' of treaty claims, did not emerge in the decisions of claims commissions. The commissions did not regard international law claims as 'independent' from local claims by the affected company or from third party interests potentially involved. This approach is preferable to investment tribunals' views on the supposed independence of IIA claims, which often fail to acknowledge both that shareholder indirect claims involve damages suffered by the company and the consequences related to claim duplication.

## A Shareholder claims

### 1 *Early arbitral decisions*

A good number of arbitral decisions involved the issue of shareholder standing in respect of measures against the company in which they hold shares. Several of the early decisions were rendered at the beginning of the 20th century. In the *LaRocque* case before the *Brazilian-Bolivian* Arbitral Tribunal, a surviving partner tried to pursue the firm's claim.<sup>114</sup> The tribunal rejected the claim because the claimant had not explained 'why he in his own behalf sued for an indemnity which, if it were due, would accrue to the firm'.<sup>115</sup> More influential were the decisions in *Delagoa Bay*<sup>116</sup> and *El Triunfo*,<sup>117</sup> although *Delagoa Bay* accepted shareholder standing based on the arbitration agreement and *El Triunfo* simply relied on *Delagoa Bay*. Yet in resolving the substance of the claims, *Delagoa Bay* considered third party interests and *El Triunfo* the lack of an effective remedy available to the company.

*Delagoa Bay* concerned the termination of a railway concession and the seizure of the railway company by Portugal.<sup>118</sup> Under the arbitral agreement concluded among Portugal, the US, and Great Britain, the arbitral tribunal was to fix the damages owed by the Portuguese government in respect of nationals of the other two countries.<sup>119</sup> The

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<sup>114</sup> Ralston (1926) 140.

<sup>115</sup> Ibid, 141 (footnote omitted).

<sup>116</sup> Clay stated that *Delagoa Bay* 'appear[ed] to be the first clear case involving shareholder interests of an American national where the Government officially intervened'. Clay (1956) 6.

<sup>117</sup> For an investment tribunal decision citing *El Triunfo* on shareholder standing see *Pan American* [215].

<sup>118</sup> *Delagoa Bay*, 397-398.

<sup>119</sup> Ibid, 398.

concessionaire was a Portuguese company,<sup>120</sup> as required by the concession contract, but almost all of its shares were held by a British company.<sup>121</sup> The tribunal found that the termination of the concession and the seizure of the concessionaire company by Portugal had not been in conformity with the concession contract.<sup>122</sup>

It is doubtful that the decision in *Delagoa Bay* lends support to the proposition that shareholders have standing before international tribunals to complain of measures taken vis-à-vis the company.<sup>123</sup> In fact, the tribunal observed that, in strict accordance with the law, only the concessionaire had the right to claim from the Portuguese government.<sup>124</sup> The tribunal noted, however, Portugal's declaration that it would not raise any objection based on the fact that the person who really had standing was not a party to the proceedings and, moreover, the parties' agreement to substitute the British company for the Portuguese concessionaire.<sup>125</sup> As the shareholder standing question had been settled by the arbitral agreement, this deprives the decision of precedential value in that regard.<sup>126</sup> Importantly for present purposes, however, the tribunal stated that compensation would be granted to the British company only on the condition that it would use the sum to pay its creditors.<sup>127</sup>

The case of *El Triunfo* concerned a concession granted by El Salvador for the right of steam navigation of the port of El Triunfo, which was 'subsequently duly acquired under the laws of Salvador' by the El Triunfo Company.<sup>128</sup> The latter was a Salvadorian company,<sup>129</sup> but its main shareholders were US nationals.<sup>130</sup> The dispute between the US

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<sup>120</sup> This meant that the applicable law was Portuguese law. Ibid, 399. However, this was only of theoretical significance since 'Portuguese law [did] not contain on the decisive and pertinent points any provision that would depart from the general principles of civil law of modern nations'. Ibid. Author's translation (original French).

<sup>121</sup> Ibid.

<sup>122</sup> Ibid, 402.

<sup>123</sup> See *Affaire des réparations allemandes*, 509. See also Hyde (1945) 905; Jones (1949) 243.

<sup>124</sup> *Delagoa Bay*, 409.

<sup>125</sup> Ibid. The tribunal then added that the Delagoa Bay Company had in fact assumed the task incumbent upon the Portuguese concessionaire and become the owner of almost all the latter's shares. Ibid. See Jiménez de Aréchaga (1965) 84.

<sup>126</sup> Díez de Velasco (1974) 133.

<sup>127</sup> Ibid.

<sup>128</sup> *El Triunfo*, 467, 470.

<sup>129</sup> Ibid, 479.

<sup>130</sup> Ibid, 467.

and El Salvador related to the loss sustained by these shareholders by reason of a series of actions resulting in the concession being destroyed.<sup>131</sup> These actions included a ‘fraudulent conspiracy’ within the company that ended with its bankruptcy.<sup>132</sup> Precisely when the ‘American investors’ were going to take action to undo the acts of the conspirators, El Salvador closed the port of El Triunfo to all imports.<sup>133</sup> Thus, the efforts of the US shareholders to undo the conspiracy’s effects on the company were thwarted.<sup>134</sup> With respect to standing, the tribunal simply observed:

We have not discussed the question of the right of the United States under international law to make reclamation for these shareholders in El Triunfo Company, a domestic corporation of Salvador, for the reason that the question of such right is fully settled by the conclusions reached in the frequently cited and well-understood Delagoa Bay Railway Arbitration.<sup>135</sup>

However, the statement that diplomatic protection of shareholders for measures taken against the local company was ‘fully settled’ in the *Delagoa Bay* case is questionable.<sup>136</sup>

Of relevance here is the tribunal’s response to El Salvador’s objection that the US citizens should have first resorted to the Salvadorian courts and that only if they were denied justice was diplomatic protection warranted.<sup>137</sup> The tribunal accepted this ‘general proposition of international law’, but rejected the objection because a complaint to the Salvadorian courts would have been futile.<sup>138</sup> The tribunal had previously found there had been a conspiracy against the concession ‘to appropriate it and the entire investment of the American shareholders for the benefit of the conspirators’.<sup>139</sup> The tribunal acknowledged that, in principle, it was the corporation itself that had to look for an

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<sup>131</sup> Ibid, 476; Douglas (2009) 425.

<sup>132</sup> *El Triunfo*, 475-476.

<sup>133</sup> Ibid, 476.

<sup>134</sup> Ibid.

<sup>135</sup> Ibid, 479.

<sup>136</sup> See Hyde (1945) 906; Bagge (1958) 173.

<sup>137</sup> *El Triunfo*, 476. In *Alsop*, Chile also argued that since the directly affected company was Chilean, the grievances should have been referred to Chilean courts. *Alsop*, 359. This was rejected as inconsistent with the ‘terms of the reference’ to the *amiable compositeur* and as an ineffective remedy. Ibid, 360. See Bagge (1958) 174; Jiménez de Aréchaga (1965) 89. Further, while the US was exercising diplomatic protection in relation to the Chilean firm’s partners—the firm being in liquidation at the time of the decision—the compensation was awarded to ‘the representatives of the firm of Alsop and Company’. *Alsop*, 359, 375.

<sup>138</sup> *El Triunfo*, 476-477.

<sup>139</sup> Ibid, 474.

appropriate remedy.<sup>140</sup> It dismissed this course of action, however, because when the corporation could have sued in the Salvadorian courts, El Salvador had aided the conspirators and ‘destroyed the only thing of value worth retrieving through the courts’.<sup>141</sup> Thus, the tribunal found that ‘the proper remedy’ was for the corporation to seek redress, but that it was not applicable in the circumstances of the case.<sup>142</sup>

## 2 *The Venezuelan Commissions*

The Venezuelan Commissions considered the issue of claims by shareholders or members of other collective bodies, even though their constitutive treaties contained no specific provisions on such claims. In *Kunhardt*, the US-Venezuela Commission dealt with two claims by Kunhardt & Co., a US copartnership.<sup>143</sup> One of the claims arose from Venezuela’s annulment of a concession owned by a Venezuelan company, in which Kunhardt & Co. owned three-fourths of the shares.<sup>144</sup> While both the US and Venezuelan Commissioners found this claim could not be allowed,<sup>145</sup> the latter took a stricter view. He noted that shareholders do not co-own the company’s property and are only entitled to the profits or to proportional parts of such property in case of adjudication by the company or the latter’s dissolution or liquidation.<sup>146</sup> Kunhardt & Co. had thus no standing before the Commission to claim damages for breach of a contract between Venezuela and the Venezuelan company.<sup>147</sup>

The opinion by the US Commissioner is more relevant here. Writing for the Commission, he also stated that as a matter of principle ‘the property of a corporation in esse belongs not to the stockholders individually or collectivity, but to the corporation

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<sup>140</sup> Ibid.

<sup>141</sup> Ibid. For Jiménez de Aréchaga, *El Triunfo* was not germane to the question of ‘protection of shareholders for acts affecting the company’ because the act giving rise to El Salvador’s responsibility ‘was an act directly aimed at the shareholders as such’. Jiménez de Aréchaga (1965) 86.

<sup>142</sup> See Müller (2015) 173. Referring to *Delagoa Bay* and *El Triunfo*, Borchard observed that ‘that the foreign corporations in both cases were practically defunct, and the equitable interest of the stockholders could with some justice be supported, as it was, by their government’. Borchard (1915) 626.

<sup>143</sup> *Kunhardt & Co.*, 172.

<sup>144</sup> Ibid, 173.

<sup>145</sup> As to the other claim—relating to damage caused by Venezuelan troops to an estate owned by Kunhardt & Co.—both Commissioners agreed that it should be allowed. Ibid, 176-178, 180.

<sup>146</sup> Ibid, 179. While the Venezuelan Commissioner relied in part on Venezuelan law for these findings, this law was also important in the American Commissioner’s reasoning. See *ibid*, 174.

<sup>147</sup> Ibid, 180. He added that the decisions in *Delagoa Bay* and *El Triunfo* ‘[had] been carefully examined, and [did] not present any likeness to the present claim’. Ibid.



itself'.<sup>148</sup> He nonetheless held that Kunhardt & Co. had standing to claim 'for such losses as they may prove they [had] sustained by reason of the wrongful annulment of the concession'.<sup>149</sup> For him, 'the real interest of Kunhardt & Co. [was] an equitable right to their proportionate share of the corporate property after the creditors of the corporation [had] been paid'.<sup>150</sup> Since no evidence had been furnished of the corporate debts, 'an essential element of proof to determine the actual measure of the claimant's loss [was] entirely wanting' and thus the claim had to be disallowed.<sup>151</sup>

The fact that creditors had priority in case of liquidation did not mean, however, that they had a direct right over a bankrupt party's assets. In *Bance*, also before the US-Venezuela Commission, the receiver in bankruptcy of a Venezuelan individual had brought a claim on behalf of two US creditors.<sup>152</sup> The creditors were claiming a proportionate share of a credit held by this individual against Venezuela.<sup>153</sup> The claim was rejected on the grounds that bankruptcy 'deprives the bankrupt party of the administration of his property, which then goes to his creditors', but this only upon agreement or final liquidation.<sup>154</sup> Pending the bankruptcy proceedings, however, a credit of the bankrupt party could not be considered the property of any of its creditors.<sup>155</sup> The same view but as regards members of an association was adopted by the Germany-Venezuela Commission in *Brewer, Moller and Co.* One of the claims referred to a credit the association had against Venezuela.<sup>156</sup> Under Venezuelan law, only one of the associates, who was not among the claimants, was the owner of the association's property.<sup>157</sup> Jurisdiction was thus lacking, since the German associates were not the owners nor had any interest over debt owned by the association.<sup>158</sup>

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<sup>148</sup> Ibid, 175. See also *J.M. Henriquez*, 728; Borchard (1915) 624.

<sup>149</sup> *Kunhardt & Co.*, 175-176.

<sup>150</sup> Ibid, 176.

<sup>151</sup> Ibid.

<sup>152</sup> *Bance*, 233-234.

<sup>153</sup> Ibid, 234.

<sup>154</sup> Ibid.

<sup>155</sup> Ibid.

<sup>156</sup> *Brewer, Moller and Co.*, 434.

<sup>157</sup> Ibid, 434.

<sup>158</sup> Ibid, 435.

Regarding claims owned by a firm and its members' interests over these claims, a decision of the Netherlands-Venezuela Commission deserves special mention. Claimants in the *Baasch and Römer* case were respectively the successors and liquidators of two firms, both composed of a majority of Dutch subjects.<sup>159</sup> One of the claims related to the destruction, attributed to Venezuela, of a plant owned by a Venezuelan corporation in which the firms held shares.<sup>160</sup> The corporation's bankruptcy had followed and the claim referred to all the shareholding.<sup>161</sup> This claim was rejected because the injured property was owned by the corporation.<sup>162</sup> As a Venezuelan entity, the latter had no standing before the Commission.<sup>163</sup> Part of the Commission's reasoning regarding the rest of the claims is, however, of more interest here. These claims derived from unsettled debts of the Venezuelan government relating to supplies and money furnished by the two firms.<sup>164</sup> In allowing these claims—which the successors and liquidators of the firms put forward—the Umpire stated that

the two firms being extinct the claims [could] be allowed in proportion to the stated interest of the Dutch members thereof... [T]here seem[ed] to be no question about the indebtedness of the National Government, and it at most mean[t] a payment in this way instead of some other and [would] be a cancellation of its indebtedness pro tanto, which indebtedness it [had to] discharge in some manner. No inequity or injustice [was] therefore done, even if a technical mistake ha[d] been made.<sup>165</sup>

With respect to creditors' interests over their debtor's claims, in *Turini* a claim before the US-Venezuela Commission was 'allowed to the administratrix and heirs at law of Giovanni Turini, deceased'.<sup>166</sup> Being US citizens, two creditors who had entered into contracts with Turini in relation to the works performed by him for Venezuela appeared as intervenors in the case.<sup>167</sup> In allowing the claim, the Umpire also found that the two

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<sup>159</sup> *Baasch and Römer*, 723-724.

<sup>160</sup> *Ibid*, 726.

<sup>161</sup> *Ibid*.

<sup>162</sup> *Ibid*.

<sup>163</sup> *Ibid*. The Commission added: 'The shareholders being Dutch does not affect the question. The nationality of the corporation is the sole matter to be considered.' *Ibid*.

<sup>164</sup> *Ibid*, 724-726.

<sup>165</sup> *Ibid*, 727. Jones argued that '[t]he "technical mistake" lay in allowing Baasch a *locus standi* before the tribunal'. Jones (1949) 245.

<sup>166</sup> *Turini*, 171.

<sup>167</sup> *Ibid*, 170.

creditors ‘should be protected to the extent of their proportionate interest in the distribution of the award herein made to the estate of Giovanni Turini’.<sup>168</sup>

Despite the absence of guidance from the applicable treaties, the Venezuelan Commissions discussed certain basic notions relevant to shareholder claims. The principle that shareholders do not have either direct or indirect rights over corporate assets was upheld. These assets included property and contractual rights, debts, and generally claims against third parties. The rule was that only the company—and not its shareholders or creditors—could exercise its rights, at least as long as the company’s legal existence had not been terminated. Some decisions, however, appeared to recognize a right of shareholders to bring claims for losses they had suffered as a result of measures taken against company assets. Yet in this case the Commission generally considered the position of the company’s creditors, given their priority over shareholders, before the shareholder claim could be allowed.

The source of these notions in terms of the applicable law was not always clear. The Venezuelan Commissions were international jurisdictions formed by the same treaties that also created the causes of action. Thus, application of international law was inevitable. Still, the Commissions also acknowledged a role for national law in claims involving the relationship between shareholder and company rights, even if its application was not expressly foreseen in the relevant treaties. National law was relevant in determining who the owner of the assets was, what rights (if any) other parties had over them, and the scope and qualifications of the rights in question. The Commissions also often took into account whether their decisions regarding potentially overlapping claims over the same assets could lead to inequity or injustice. As noted above, however, this did have a basis in the applicable treaty provisions.

### 3 *The Mexican Commissions*

Unlike the Venezuelan Commissions, the constitutive instruments of the Mexican Commissions did contain special provisions on claims by corporations and by nationals of the parties for losses suffered by corporations in which they had an interest.<sup>169</sup> As regards standing, claims by corporations were uncontroversial. The Commissions adopted the criteria of the place of incorporation to determine the corporations’

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<sup>168</sup> Ibid, 171.

<sup>169</sup> RIAA IV, 11, 779, (US); RIAA V, 8 (Great Britain), 314 (France), 568 (Germany).

nationality.<sup>170</sup> With respect to claims for losses by persons having an interest in an injured corporation or other collective entities, Article I of the Mexico-US General Claims Convention specifically provided for the Commission's jurisdiction over the following category of cases:

[A]ll claims for losses or damages suffered by citizens of either country by reason of losses or damages suffered by any corporation, company, association or partnership in which such citizens have or have had a substantial and bona fide interest, provided an allotment to the claimant by the corporation, company, association or partnership of his proportion of the loss or damage suffered is presented by the claimant to the Commission hereinafter referred to...<sup>171</sup>

Of relevance here is the condition on which these claims were allowed, i.e., an 'allotment' to the claimant.<sup>172</sup> The precise meaning of the term 'allotment' in this context—or, for that matter, of the four other terms in other languages used in the different Conventions to convey the same idea—is not straightforward.<sup>173</sup> Its purpose, however, was clearly to avoid double compensation for the same damage.<sup>174</sup> The Mexico-Great Britain Commission, for example, could 'find for the provision requiring such allotment no other ground than a justifiable desire that Mexico should not, after once having been obligated to pay compensation to British subjects, whose interest in a non-British Company, Partnership or Association exceeded fifty per cent, be again confronted by an integral claim on the part of the Company, Partnership or Association itself'.<sup>175</sup>

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<sup>170</sup> See Feller (1935) 115 (also referring to the only case—*Rep. Alemana (Mexico Plantagen, G.m.b.H.) v. Estados Unidos Mexicanos*, Decision No. 27 (unpublished)—where the problem of corporate nationality appears to have been discussed by the Mexican Commissions). In the case of a claim by a company, for jurisdictional purposes 'the nationality of the creditors' and 'that of the stockholders in case of a solvent company' was regarded as immaterial by the Mexico-US General Claims Commission. See *Greenstreet*, 463; Phillips (1933) 234.

<sup>171</sup> RIAA IV, 11. The Convention creating the Mexico-US Special Claims Commission contained similar language. See RIAA IV, 779. The Conventions with European countries allowed these claims but using a more precise threshold. Instead of requiring a 'substantial and bona fide interest', these Conventions required 'an interest exceeding fifty per cent of the total capital'. RIAA V, 8 (Great Britain). See also RIAA V, 314 (France), 568 (Germany); Feller (1935) 117.

<sup>172</sup> The Panama-US Claims Convention of 1926, which created a General Claims Commission, also provided for an 'allotment' to the claimant in identical terms as the Mexico-US Commissions. See RIAA VI, 301.

<sup>173</sup> Feller (1935) 118-119.

<sup>174</sup> *Ibid*, 118. Diez de Velasco criticized this interpretation by Feller and other authors as not considering 'one of the most serious problems that may arise once we recognize the admissibility of claims both for indirect damages and for indirect damages of a secondary degree: the possibility of overlapping claims'. Diez de Velasco (1974) 136. Author's translation (original French).

<sup>175</sup> *Frederick Adams*, 217. The Commission added that to 'safeguard the respondent Government against this eventuality, the Convention stipulates that the joint interest be reduced, by means of an allotment, by

But although the ‘allotment’ provision may have been effective in preventing a subsequent claim by the company for the same losses, it did not address all the possible implications of shareholder claims for damages suffered by the company. These implications included the situation of the company’s creditors, who could be unfairly prejudiced if the allotment allowed the shareholder to claim for a proportionate share of the losses without accounting for the company’s debts. In fact, provided the allotment covered the damages suffered, the Commission had jurisdiction, yet

the question of the amount of damages still remain[ed] when the case [came] up for decision on the merits. If the corporation [was] insolvent, then an award to the shareholder of a proportionate share of the damage caused to the corporation [would] unquestionably operate in defraud of creditors.<sup>176</sup>

Feller further called for the Commissions to exercise caution vis-à-vis shareholder claims whenever there was a ‘prima facie showing’ that the corporation could be insolvent.<sup>177</sup> In those cases, the Commission should require the production of a balance sheet.<sup>178</sup> If the company was insolvent, the Commission had to grant a ‘small award’ commensurate with what it believed was the real value of the shareholder’s interest.<sup>179</sup>

Thus, even in light of a provision expressly granting jurisdiction over shareholder claims for losses or damages ‘by reason of losses or damages suffered’ by the corporation, double payment by the respondent state of the same damage had to be avoided. The provision requiring the presentation of an ‘allotment’ by the affected entity to the claimant, which pertained to the admissibility of the claim,<sup>180</sup> addressed this problem. The commission hearing the shareholder claim could also consider the situation of the company’s creditors, although it was not always clear whether this consideration concerned the admissibility or the merits of the claim.<sup>181</sup>

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the proportional part of the losses, for which British partners or shareholders claim’. Ibid. See also *Esclangon*, 552.

<sup>176</sup> Feller (1935) 121.

<sup>177</sup> Ibid.

<sup>178</sup> Ibid.

<sup>179</sup> Ibid.

<sup>180</sup> *Esclangon*, 553.

<sup>181</sup> Ibid, 554-556.

In parallel and subsequent to the Mexican Commissions, claims commissions and tribunals constituted following the First and Second World Wars adopted decisions germane to the issue of shareholder claims. One should be cautious, however, in drawing general conclusions from these decisions as regards international tribunals' jurisdiction. Aside from allowing for the specific provisions of the relevant treaties, the latter were adopted with special circumstances and goals in mind.<sup>182</sup> With these caveats in mind, the decisions generally did not accept shareholder claims for losses suffered by the company absent a treaty provision authorizing this type of claims. In *The Deutsche Amerikanische Petroleum Gesellschaft* case of 1926, the tribunal observed that 'the highest courts of most countries continue[d] to hold that neither the shareholders nor their creditors have any right to the corporate assets, other than to receive, during the existence of the company, a share of the profits, the distribution of which has been decided by a majority of the shareholders, and, after its winding up, a proportional share of the assets'.<sup>183</sup> Nor did the shareholders have a property right over the profits generated by the company's operation, except and to the extent they were distributed.<sup>184</sup>

In terms of the admissibility of shareholder claims the *Standard Oil* case, also decided in 1926—by a Germany-US Claims Commission—is relevant. The claim referred to the sinking by Germany during the First World War of seven ships, owned by British corporations.<sup>185</sup> Claimants were US nationals and shareholders in the corporations and claimed they had been 'indirectly damaged'.<sup>186</sup> The Commission found that the Germany-US Peace Treaty entitled these shareholders to be compensated for such indirect damages and gave them 'the right, through espousal by their Government, to assert their claims

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<sup>182</sup> In *The Vinland* (Administrative Decision No. VII), the Germany-US Mixed Claims Commission stated that the reason for the 1921 Peace Treaty to hold Germany liable for war measures affecting companies' property in which US nationals had an interest was that '[i]n applying these war measures Germany acted advisedly, with full knowledge of the nature, character, and extent of the property, rights, and interests affected and of the fact that they were owned by American nationals'. *The Vinland*, 231. See also *Barcelona Traction* (Second Phase) [60].

<sup>183</sup> *The Deutsche Amerikanische Petroleum Gesellschaft*, 787. Commissions functioning following the Second World War also recognized that, in principle, shareholders do not have an ownership right over the company's assets, without prejudice to the effect of special treaty provisions. See *Les Petits-Fils*, 77; *Società Mineraria*, 178; *Dervillé*, 41; *Biens italiens en Tunisie*, 485.

<sup>184</sup> *The Deutsche Amerikanische Petroleum Gesellschaft*, 790.

<sup>185</sup> *Standard Oil*, 304.

<sup>186</sup> *Ibid.*

against Germany before this Commission'.<sup>187</sup> But the Commission also stated that the claimants had the burden 'to prove that the British corporations [had] suffered damages through the act of Germany and the amount thereof and the extent to which such damages ha[d] fallen, on the claimants as stockholders of such corporations, and that as such stockholders they ha[d] not already been indirectly compensated therefor through payment to the corporations'.<sup>188</sup> And since Great Britain had already paid the British corporations the value of the vessels,<sup>189</sup> the US shareholders of the British corporations owning these ships had failed to establish that Germany had caused them any loss or damage.<sup>190</sup>

## B Contract claims and treaty claims

### 1 *The distinction before Woodruff*

The historical origin of the contract claims/treaty claims distinction in modern investment arbitration is found in the *Woodruff* case decided by the 1903 US-Venezuela Commission.<sup>191</sup> Before *Woodruff*, however, certain decisions already referred to some kind of distinction between contractual obligations and obligations under international law.<sup>192</sup> In *Dennison*, for example, the Mexico-US 1868 Mixed Commission's Umpire found that no authority had been granted to conclude the contract in question on behalf of the Mexican Government.<sup>193</sup> Notwithstanding this, the Umpire added that the other party to the contract, a US national, had entered into the contract voluntarily and 'it was not therefore one the fulfillment of which by the Mexican Government that of the United States was called on to enforce'.<sup>194</sup>

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<sup>187</sup> Ibid, 304,307.

<sup>188</sup> Ibid, 304. See also *The Vinland*, 238-239.

<sup>189</sup> *Standard Oil*, 307.

<sup>190</sup> Ibid, 308. In *Ziat Ben Kiran*, Huber asserted that in the case of a claim relating to interests in a legal person held by persons of another nationality, it is necessary to 'examine the merits of each case in order to determine if the damage in question has directly hit the person in whose behalf the claim was presented'. *Ziat Ben Kiran*, 729. Author's translation (original French).

<sup>191</sup> See *Vivendi I Annulment* [98-100].

<sup>192</sup> References to the special nature in international law of claims arising out of contracts were also common in the writings of authors. See e.g. Drago (1907) 693; Root (1909) 529.

<sup>193</sup> *Dennison*, 150.

<sup>194</sup> Ibid.

A state's 'responsibility for wrongs and injuries or torts' vis-à-vis foreigners was generally seen as a proper object of international reclamation.<sup>195</sup> But international adjudicative bodies have long treated claims for breach of contract as a special category.<sup>196</sup> As regards contract claims, as the 1885 US-Venezuela Claims Commission noted in *Garrison*, both Great Britain and the US had followed a practice of generally refusing to intervene before a foreign state that had a contract with one of their nationals.<sup>197</sup> However, the Commission, relying on Hall, observed it would be

difficult, if not impossible, to assign a good reason why, on principles of abstract right and justice, an injury to a citizen arising out of a refusal of a foreign power to keep its contractual engagements, did not impose an obligation upon the government of his allegiance to seek redress from the offending country, quite as binding as its recognized duty to interfere in cases involving wrongs to person and property.<sup>198</sup>

The Commission decided it was bound to pass on a claim for damages based on 'a breach of private contract between a citizen of one state and the government of another'.<sup>199</sup> It affirmed its jurisdiction over contract claims based not on any issue of principle but on the provisions of its constitutive treaty.<sup>200</sup>

The exercise of international jurisdiction over claims for breach of contract had been common since the first decades of the 19th century, whenever the applicable treaties were interpreted as conferring jurisdiction over such claims.<sup>201</sup> Still, the special character of contract claims was generally upheld. However, the distinction between contract claims and claims for 'wrongs to person and property', as drawn in *Garrison*, suggests that the special treatment accorded to contract claims did not emanate from the (national) law applicable to them. Aside from the policy and other reasons behind state practice

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<sup>195</sup> *Garrison*, 232-233.

<sup>196</sup> Despite the special place of contractual breaches before international jurisdictions, '[t]he great majority of writers [were] agreed that the failure of a State to fulfil a contractual obligation, unless such a failure [was] confiscatory or discriminatory in nature, [did] not automatically result in a breach of international law'. Lipstein (1945) 134. See also Di Pietro (2005) 224-228.

<sup>197</sup> *Garrison*, 232-233. This practice appears to have been based more on legal reasons in the case of the US than of Great Britain, who relied basically on expediency considerations. See *ibid.* See also Hershey (1907) 38-40; Ho Qing Ying (2014) 13-15.

<sup>198</sup> *Garrison*, 233.

<sup>199</sup> *Ibid.*

<sup>200</sup> *Ibid.*

<sup>201</sup> Borchard (1915) 297. See also Ralston (1926) 75.



sustaining the distinction,<sup>202</sup> Borchard discussed several reasons why states were ‘less zealous’ in pursuing contract claims than other claims related to harm suffered by one of its nationals in a foreign country.<sup>203</sup> These reasons included that ‘by going abroad, [the foreign investor] submits impliedly to the local law and the local judicial system. The contract or the law provides remedies for breach of contract’.<sup>204</sup>

## 2 *Woodruff and other relevant decisions of the Venezuelan Commissions*

*Woodruff* concerned a claim for the payment of bonds issued through, and secured by assets of, a company whose rights and duties were eventually transferred to Venezuela.<sup>205</sup> Venezuela had granted the company rights over movable and immovable property through a contract that also provided for the construction of a railroad.<sup>206</sup> For the Umpire, Venezuela’s liability for the bonds hinged on the company’s original contractual rights and duties.<sup>207</sup> The contract contained a clause submitting disputes under the agreement to ‘the common laws and ordinary tribunals of Venezuela’; the disputes could under no circumstance be ‘the subject of international reclamation’.<sup>208</sup> The interpretation of this provision determined the outcome of the case.

The decision noted that ‘a contract between a sovereign and a citizen of a foreign country can never impede the right of the Government of that citizen to make international reclamation, wherever according to international law it has the right or even the duty to do so, as its rights and obligations can not be affected by any precedent agreement to which it is not a party’.<sup>209</sup> This, however, did not ‘interfere with the right of a citizen to pledge to any other party that he, the contractor, in disputes upon certain matters [would] never appeal to other judges than to those designated by the agreement’.<sup>210</sup> But his

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<sup>202</sup> Contract claims were seen by the US to ‘stand upon a very different footing from those which arise from injuries to person and property’, one of the reasons being that ‘the government ha[d] no *right* to compel another power to perform its contracts made with citizens of the United States’. *Garrison*, 233.

<sup>203</sup> Borchard (1915) 285.

<sup>204</sup> *Ibid.*

<sup>205</sup> *Woodruff*, 221.

<sup>206</sup> *Ibid.*

<sup>207</sup> *Ibid.*

<sup>208</sup> *Ibid.*

<sup>209</sup> *Ibid.*, 222.

<sup>210</sup> *Ibid.*

government's rights under international law could not be affected.<sup>211</sup> In light of the forum selection provision in the contract and the claimant's lack of appeal to Venezuelan courts, the Umpire found that 'by the very agreement that is the fundamental basis of the claim, it was withdrawn from the jurisdiction of this Commission'.<sup>212</sup>

Two points are relevant here. First, the decision seems to recognize the Commission's *a priori* jurisdiction over the claim, since it was 'a claim against the Venezuelan Government, owned by an American citizen, being a claim that [was] entitled to be brought before this Commission'.<sup>213</sup> The choice of forum provision, however, provided a reason for jurisdiction not to be exercised over this particular claim, even if the claim was being put forward by the state, who was not a party to the contract. But the decision that 'the claimant by his own voluntary waiver ha[d] disabled himself from invoking the jurisdiction of this Commission' was 'without prejudice on its merits, when presented to the proper judges'.<sup>214</sup> Second, in *Woodruff* there was a need to distinguish between the rights of the private party to the contract, on the one hand, and those of the two states concerned,<sup>215</sup> on the other. Yet, nowadays, investment tribunals use the 'fundamental basis of the claim' concept to distinguish between different types of claims that may be brought by the same party or both by it and a related entity.

The concept of 'fundamental basis' or 'fundamental ground' of the claim also featured in *Selwyn*.<sup>216</sup> Here, the Great Britain-Venezuela Commission disregarded not only local proceedings referring to the same contract, but also a contractual forum selection provision since the claim before it was 'fundamentally different' from a contract claim.<sup>217</sup> The Commission noted that '[t]he fundamental ground of this claim as presented [was] that the claimant [had been] deprived of valuable rights, of moneys, properties, property, and rights of property by an act of the Government'.<sup>218</sup> Because of this finding, the Commission found it unnecessary to decide whether its jurisdiction under the relevant

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<sup>211</sup> Ibid.

<sup>212</sup> Ibid, 223.

<sup>213</sup> Ibid, 222.

<sup>214</sup> Ibid, 223.

<sup>215</sup> That is, the private party's state of nationality and the state party to the contract.

<sup>216</sup> *Selwyn*, 383.

<sup>217</sup> Ibid.

<sup>218</sup> Ibid.

treaty included contractual matters.<sup>219</sup> Yet the idea of ‘fundamental feature of the claim’ was applied exclusively to decide jurisdiction, without ‘pass[ing] at all upon the merits of the claimant’s case’. The truth about the facts ‘remain[ed] to be determined upon the full proofs, which [were] in no sense prejudiced or predetermined by this opinion’.<sup>220</sup>

The Venezuelan Commissions generally affirmed their jurisdiction over contract claims. In *Miliani*, the Italy-Venezuela Commission observed that ‘commissions have and exercise jurisdiction over contract claims, while the diplomatic branch of government, although usually reserving the right, rarely presses matters of this nature’.<sup>221</sup> In *La Guaira*, the US-Venezuela Commission stated that ‘when the Government itself has violated a contract to which it is a party’, the Commission’s jurisdiction under its constitutive treaty was clear.<sup>222</sup> When the contract had been concluded with a state instrumentality, however, the Commission’s jurisdiction turned on whether the instrumentality had acted in its ‘governmental, legislative, or public’ character, or in its ‘proprietary or private’ one.<sup>223</sup> In the former case, the same principle as when the ‘Government itself’ is a party applied; the latter case, however, was subject to the same rule as when a foreigner concluded a contract with a private party in the latter’s country: he was ‘ordinarily remitted’ to the available local remedies.<sup>224</sup>

This distinction relying on the character of the state’s conduct<sup>225</sup> has similarities to the one employed by some investment tribunals to distinguish between contract and treaty claims.<sup>226</sup> However, no clear criteria to distinguish between contract claims and claims involving a contract but having a non-contractual nature emerged from the Venezuelan Commissions’ decisions. In *La Guaira*, the distinction depended on the character in which the contract had been entered into by the municipality.<sup>227</sup> If concluded in a private capacity, ‘the municipality [was] to be regarded as neither more nor less than

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<sup>219</sup> Ibid.

<sup>220</sup> Ibid, 384.

<sup>221</sup> *Miliani*, 591.

<sup>222</sup> *La Guaira*, 243.

<sup>223</sup> Ibid.

<sup>224</sup> Ibid.

<sup>225</sup> Commentators acknowledged the distinction as well. See Drago (1907) 693.

<sup>226</sup> See Chapter 6.

<sup>227</sup> *La Guaira*, 243.

a private corporation and as such could sue or be sued in respect thereof'.<sup>228</sup> Other authorities focused on the character in which the contract was allegedly breached. International law protection would be available only if the government exceeded the role of private contractor and took action not available to the private party, 'to escape its obligations under the contract, [thus] upset[ting] the contractual basis'.<sup>229</sup> Yet, on the one hand, because no single criterion was adopted regarding the relevance of whether the state acted in a sovereign capacity, this factor does not necessarily provide clear answers, even as a matter of principle. On the other hand, the reference to the attempt to escape from the contractual framework suggests that ultimately what matters is whether the state measures are within the scope of the obligations in question (be they contractual or international law obligations).

### 3 *Contract claims before the Mexican Commissions*

The issue of international jurisdiction over contract claims came squarely before the Mexican Commissions. In *Davies*, the Mexico-US General Claims Commission overruled a Mexican motion to dismiss, which was based on the contractual nature of the claims.<sup>230</sup> The Commission noted that '[a]lthough the allegation of nonperformance of contractual obligations is apparent on the face of the record, it does not necessarily follow as a legal conclusion that the claim does not fall within the General Claims Convention'.<sup>231</sup> It was in *Illinois Central Railroad Company*, however, that the issue was considered in some detail (Mexico having filed the same motion).<sup>232</sup> The claim was for sums due to the company in relation to locomotive engines sold to the Mexican Government Railway Administration.<sup>233</sup>

For the Commission, the issue hinged on the interpretation of the Mexico-US General Claims Convention, which defined the scope of its jurisdiction.<sup>234</sup> No general principle on jurisdiction over contract claims could be discerned from international

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<sup>228</sup> Ibid.

<sup>229</sup> Dunn (1932) 166. See also Borchard (1915) 284; Sinclair (2013) 79 (discussing the *Jalapa Railroad & Power Co* case).

<sup>230</sup> *Davies*, 21.

<sup>231</sup> Ibid.

<sup>232</sup> *Illinois Central Railroad*, 22.

<sup>233</sup> Ibid.

<sup>234</sup> Ibid.

decisions.<sup>235</sup> There was no rule ‘according to which mere nonperformance of contractual obligations by a government in its civil capacity withholds jurisdiction, whereas it grants jurisdiction when the nonperformance is accompanied by some feature of the public capacity of the Government as an authority’.<sup>236</sup> The Commission further saw no reason not to submit contract claims to an international tribunal’s jurisdiction.<sup>237</sup> The Convention’s terms included contract claims,<sup>238</sup> despite the provision that claims be decided, *inter alia*, according to ‘principles of international law’.<sup>239</sup> International law could be applied for the resolution of contract claims,<sup>240</sup> although they did not entail state responsibility under international law.<sup>241</sup>

As the Venezuelan Commissions, the Mexican Commissions did not develop a conceptual framework to distinguish contract claims from other related claims. There were, of course, situations in which—notwithstanding the existence of a contract—the claim could not be described as contractual. In *Douglas*, the claim before the Great-Britain-Mexico Commission referred to a requisition by the Constitutionalist Army of, *inter alia*, passenger and freight cars.<sup>242</sup> The claimant alleged to be the owner of a system of tramways, which he had purchased from the party to which a local government had granted the concession.<sup>243</sup> Here, the fact that the Mexican government was not a party to the contract did not foreclose the claim since it was ‘for losses outside any contractual relation’.<sup>244</sup>

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<sup>235</sup> Ibid.

<sup>236</sup> Ibid. At that time, however, international tribunals and commissions would sometimes consider the capacity in which the government had acted as a relevant factor. See e.g. *Interpretation of London Agreement of August 9, 1924*, 882.

<sup>237</sup> *Illinois Central Railroad*, 24.

<sup>238</sup> Ibid, 25.

<sup>239</sup> Ibid, 23. In fact, the Mexican Commissions later entertained what clearly were contract claims. See e.g. *National Paper and Type Company*, 327, 329; *Okie*, 54-57. See also Nielsen’s dissent in *Pomeroy’s* (Diss Op Nielsen), 557 (‘The Commission has taken jurisdiction in cases involving contractual obligations arising between 1910 and 1920 in numerous cases.’).

<sup>240</sup> Although in the case the reference was not only to ‘principles of international law’, but also to those of ‘justice and equity’. *Illinois Central Railroad*, 24.

<sup>241</sup> Ibid, 23.

<sup>242</sup> *Douglas*, 136.

<sup>243</sup> Ibid.

<sup>244</sup> Ibid, 138.

The position was less clear, however, when the claim was for breach of contract. The issue was addressed by the US Commissioner, Nielsen, in several individual opinions. In *American Bottle Company*, where the claim derived from a balance due for delivered bottles, Nielsen stated:

In giving application to the principles of international law governing a claim growing out of contractual obligations an international tribunal is not concerned with a suit on a contract. There is no law of contracts in international law. In rendering an award in a case of this kind I think we must proceed on the theory that there has been a violation of property rights in the nature of a confiscation...<sup>245</sup>

In *Cook II* he observed that an international tribunal could properly regard a mere failure by the government to pay moneys owed under a contract as a confiscation in breach of international law.<sup>246</sup> In *International Fisheries Company*, he added that international law did not concern itself with contractual provisions.<sup>247</sup> International law was concerned with government actions in respect of contractual rights,<sup>248</sup> which could entail a confiscation.<sup>249</sup>

Nielsen's influence over the views of the Mexican Commissions on issues such as the minimum standard is notable.<sup>250</sup> Yet, on contract claims, although he stated that 'an international tribunal is not concerned with a suit on a contract', his view was that any breach of contract by a government vis-à-vis a private party amounts to a confiscation under international law. He did not propose a criterion to distinguish between contract claims and claims under international law.<sup>251</sup> It is not clear, moreover, whether for Nielsen there were certain types of contract breaches that could not—through lack of seriousness,

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<sup>245</sup> *American Bottle Company*, 438-439.

<sup>246</sup> *Cook II*, 508. See also *Pomeroy's* (Diss Op Nielsen), 557.

<sup>247</sup> *International Fisheries Company*, 706.

<sup>248</sup> *Ibid*, 715.

<sup>249</sup> *Ibid*.

<sup>250</sup> Roth (1949) 97.

<sup>251</sup> Lipstein (1945) 135. Admittedly, this is also true of the Mexican Commissions generally. Yet, certain decisions of a prior mixed claims commission between Mexico and the US had required 'gross injustice' to be present for allowing claims arising from contracts. Ralston (1926) 72-74. See also Dunn (1932) 166-167 (stating that the 1929 Harvard Draft convention on responsibility of States for damage done in their territory to the person or property of foreigners suggested 'no test whereby we may know an unlawful or wrongful [contractual] non-performance when we see one').

the character in which the government acted, or any other reason—be considered as a confiscation under international law.<sup>252</sup>

By contrast, for the Mexico-US General Claims Commission the principle was that there was no international responsibility when the relations between the defendant state and the foreigner were ‘of a contractual nature’.<sup>253</sup> Exceptions to the principle were often suggested in cases of denial of justice or of ‘confiscatory’ breaches of contract, where the state had allegedly acted outside its role as a contracting party.<sup>254</sup> These exceptions reflected diplomatic practice preceding the Mexican Commissions.<sup>255</sup> Confiscatory or discriminatory breaches of contract or otherwise involving a denial of justice justified an international claim.<sup>256</sup> On the one hand, this view accorded some distinctive substance to the relevant international law obligations, while, in the final analysis, Nielsen’s view conflated contract breaches with violations of international law. On the other hand, it was recognized that even in cases involving ‘confiscatory’ breaches of contract or the like, the substance of the claim would still be related to the contract.<sup>257</sup>

#### 4 *Choice of Forum Clauses*

The Venezuelan and Mexican Commissions on several occasions considered the import of forum selection clauses, including prominently different versions of the so-called Calvo Clause. The focus here is on the Commissions’ views on the effect of forum selection clauses on their jurisdiction and the outcome of the case, rather than the controversy surrounding the validity of such clause under international law. The Venezuelan Commissions were more deferential vis-à-vis these clauses than current investment tribunals.<sup>258</sup> In *Woodruff*, the US-Venezuela Commission refused to exercise jurisdiction in application of a choice of forum clause.<sup>259</sup> In *Orinoco Steamship Company*, the Commission’s Umpire concluded that the relevant forum selection clause

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<sup>252</sup> Lipstein described Nielsen’s views as contending ‘that a breach of contract in municipal law is always to be regarded, in the international sphere, as a measure in the nature of confiscation entailing State responsibility’. Lipstein (1945) 134. See also Weil (1961) 145.

<sup>253</sup> *Dickson*, 681.

<sup>254</sup> Dunn (1932) 17, 167; Feller (1935) 173.

<sup>255</sup> Feller (1935) 189.

<sup>256</sup> Ho Qing Ying (2014) 13.

<sup>257</sup> Feller (1935) 189.

<sup>258</sup> See *Turnbull*, 305.

<sup>259</sup> *Woodruff*, 223.

disable[d] the contracting parties to base a claim on this contract before any other tribunal than that which they have freely and deliberately chosen, and to parties in such a contract must be applied the words of the Hon. Mr. Finley. United States Commissioner in the Claims Commission of 1889: “So they have made their bed and so they must lie in it.”<sup>260</sup>

Finley’s opinion had been expressed in the *Flannagan* case. Speaking for the majority of the Commission, he had also observed that the insertion by Venezuela of a choice of forum clause showed ‘how solicitous she was to withdraw the concession and the questions which might arise under it from every possible cognizance and jurisdiction except her own. This she certainly had a right to do’.<sup>261</sup>

In *Rudloff*, one of Venezuela’s jurisdictional objections was based on a provision in the contract submitting all disputes arising thereunder to the tribunals and laws of Venezuela.<sup>262</sup> The US Commissioner opined that this provision applied to ‘questions affecting the interpretation of the contract, to questions whether it was being or had been complied with, and the like’.<sup>263</sup> It did not, however, prevent the private party’s state from intervening if the state party to the contract had, on policy grounds, abrogated the contract and destroyed the private party’s property rights.<sup>264</sup> The Umpire, while concurring in affirming jurisdiction, adopted a different approach. He observed that since it was a claim by US nationals, which had not been settled and had been duly presented, there was jurisdiction under the relevant treaty.<sup>265</sup> But non-compliance with the forum selection provision—which by itself did not negate the Commission’s jurisdiction—was still relevant. The Commission was supposed to consider whether, after a detailed examination of the claim, the choice of forum provision did not ‘forb[id] the Commission in absolute equity to give claimants the benefit of this jurisdiction as to the decision’.<sup>266</sup>

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<sup>260</sup> *Orinoco Steamship Company*, 199 (footnote omitted).

<sup>261</sup> Ralston (1926) 60-61. Judge Little’s dissenting opinion in *Flannagan* is one of the well-known foundations of the doctrine questioning the validity of Calvo Clauses in international law. See *ibid*, 61-62.

<sup>262</sup> *Rudloff*, 244-245.

<sup>263</sup> *Ibid*, 249.

<sup>264</sup> *Ibid*, 249-250.

<sup>265</sup> *Ibid*, 254.

<sup>266</sup> *Ibid*. See also the opinion of the France-Venezuela Commission’s Umpire in *French Company of Venezuelan Railroads Case* affirming jurisdiction but stating he could not ‘entirely ignore the restrictive features of the contract between the claimant company and the respondent Government, which in terms and in fact strictly required and still requires that all doubts and disputes arising from that contract should be resolved by the competent tribunals of the respondent Government’. *French Company of Venezuelan Railroads Case*, 350.



Regarding the Mexican Commissions, the leading case on the Calvo Clause is *North American Dredging Company*. Here, the US-Mexican Commission unanimously upheld the ‘lawfulness of the Calvo Clause’ provided it did not affect the right by the private contracting party’s state to intervene in case of breaches of international law.<sup>267</sup> The clause could be applied only to a claim related to the interpretation or fulfillment of the contract and did not prevent an incidental interpretation of the contract in a claim under international law.<sup>268</sup> The Commission intimated that the decision whether to assert jurisdiction in light of a Calvo Clause would be taken after consideration of the merits of the claims.<sup>269</sup> *International Fisheries Company* confirmed the holding in *North American Dredging Company*.<sup>270</sup> The Presiding Commissioner even suggested that a shareholder of the private party to the contract was bound by a Calvo Clause included in the contract.<sup>271</sup>

The Great Britain-Venezuela Commission also endorsed *North American Dredging Company* in several decisions, including *Mexican Union Railway*,<sup>272</sup> *The Interoceanic Railway*,<sup>273</sup> *El Oro Mining*,<sup>274</sup> and *The Veracruz Railways*.<sup>275</sup> The reason why Calvo Clauses could not apply to claims under international law was that these claims involved a ‘principle higher’ than mere ‘private interests’ and that for the private party’s state the contract was *res inter alios acta*.<sup>276</sup> The British Commissioner’s dissenting opinion in *Mexican Union Railway* is noteworthy. While in agreement with the principles expounded in *North American Dredging Company*,<sup>277</sup> he found that the

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<sup>267</sup> *North American Dredging Company*, 28-29.

<sup>268</sup> *Ibid*, 30, 32. See also *Affaire du Guano*, 101 (for an earlier arbitral decision suggesting that, even in light of a choice of forum clause submitting disputes to local courts, an international tribunal is not prevented from considering contractual aspects—as preliminary questions—when necessary to dispose of the international claim).

<sup>269</sup> *North American Dredging Company*, 33. See also *C.E. Blair* (Diss Op Nielsen), 402 (the issue whether recourse to diplomatic protection may be limited by contract ‘appears clearly to be one of substantive law and not of jurisdiction’).

<sup>270</sup> *International Fisheries Company*, 702.

<sup>271</sup> *Ibid*, 703.

<sup>272</sup> *Mexican Union Railway*, 118.

<sup>273</sup> *The Interoceanic Railway*, 185.

<sup>274</sup> *El Oro Mining*, 197.

<sup>275</sup> *The Veracruz Railways*, 222-223.

<sup>276</sup> *Mexican Union Railway*, 120.

<sup>277</sup> *Ibid*, 124.

claim at hand was based on breaches of international law.<sup>278</sup> Therefore, the British Government had standing to bring it and the Commission jurisdiction to determine it.<sup>279</sup> He added, however, an important condition: ‘provided the losses claimed do not arise solely from the fulfilment or interpretation of the contract or the execution of the work thereunder’.<sup>280</sup>

On balance, the Venezuelan and Mexican Commissions generally sought to respect the contractual parties’ choice of forum. On the one hand, the state party had the right to insist on having disputes under the contract submitted to local courts. On the other hand, the private party having accepted this condition, it was not supposed to walk away from it when a dispute erupted. The contract had to be applied in the terms concluded by the parties, including as regards the jurisdictional arrangements. Choice of forum clauses, however, did not prevent international claims related to the contract by the private party’s state, in case of breach of international law. Nor was the international Commissions’ jurisdiction affected, provided nationality and other requirements were present. But even in this case, forum selection provisions were not completely left out of the analysis when considering the international claim’s merits. Before the Commission, the claimant state was typically not a party to the contract and thus had itself not consented to the contractual forum choice. Yet to some extent, in the Commissions’ views, exercising jurisdiction over a case related to the contract entailed a deviation from the contractual parties’ agreement. This had to be taken into account in looking at the claim’s equities. Finally, the issue of the damages claimed was a relevant consideration in determining the effect of contractual provisions on the international claim. In particular, whether the claim involved nothing but damages arising from the non-application of the contract.

### C Damages corollaries

Since the first decisions of modern international arbitration it has been recognized that ‘[i]n every inquiry in respect to such a subject as value, an uncertainty necessarily exists as to the correctness of any particular determination’.<sup>281</sup> Further, it was the case at the time of the Venezuelan and Mexican Commissions (and it largely remains the case today)

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<sup>278</sup> Ibid, 128.

<sup>279</sup> Ibid.

<sup>280</sup> Ibid.

<sup>281</sup> Moore I, 261 (*Hudson’s Bay Company Claims*, US Commissioner’s Opinion).

that international law grants considerable liberty to arbitrators in assessing damages.<sup>282</sup> Yet despite the fact-specific character of damages determinations and the wide discretion accorded to arbitrators, two concepts will be discussed as relevant for present purposes. First, the relationship between the losses suffered by the private person and the international claim put forward by its state. Second, antecedents of the principle against double recovery.

#### 1 *Private losses and international claims*

As we have seen above, the Venezuelan and Mexican Commissions often distinguished between contract claims and claims under international law. Nevertheless, they did not develop clear distinguishing criteria or consistently explain the distinction's consequences. The need to distinguish often responded to the presence of a Calvo Clause: contract claims, where damages could only be granted by the forum selected in the contract, had to be differentiated from an international law claim by the relevant state to be disposed of by the international commission. But even in this context neither the Venezuelan nor the Mexican Commissions suggested that the losses in a contract claim differed necessarily from those that could be the object of a claim under international law. In claims for breach of contract, 'the plaintiff's loss [was] measured by the benefit to him of having the contract performed'.<sup>283</sup> No obvious differences could be discerned as regards international claims involving contract breaches. Not least because the function of damages assessment for a violation of international law was, in all cases, regarded as merely compensatory of the loss or injury sustained.<sup>284</sup>

Admittedly, both Commissions' reasoning on damages was sparse at best.<sup>285</sup> Yet, for example, the Italy-Venezuela Commission seemed to recognize a direct relationship between the underlying private damages claims and the national state's rights before the international commission with respect to these claims.<sup>286</sup> In *Fabiani*, the Umpire of the French-Venezuela Commission cited older authorities for the proposition that '[a]

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<sup>282</sup> Borchard (1915) 413; *Rusoro* [642].

<sup>283</sup> *De Garmendía*, 124.

<sup>284</sup> Dunn (1932) 172.

<sup>285</sup> Feller observed that '[n]o part of the law of international claims is more fragmentary or confused than that relating to the measure of damages'. Feller (1935) 290. He added that 'the decisions [gave] only the barest hints of the reasons why damages were fixed at the particular figure. Indeed, in most cases, even this hint [was] lacking.' *Ibid*, 292. See also Eagleton (1929-1930) 52.

<sup>286</sup> See *Miliani*, 591.

settlement by the Governments of the ground of international controversy between them, *ipso facto*, settles any claims of individuals arising under such controversies against the Government of the other country, unless they are especially excepted'.<sup>287</sup>

That the losses invoked by the states before the Commissions were those suffered by the named claimants and not other losses—that is, there was only one damage, regardless of who the party in the international proceedings was—can be seen from the provisions of the relevant treaties.<sup>288</sup> The Venezuelan Protocols spoke of 'claims owned by citizens of [the ten States contracting with Venezuela]',<sup>289</sup> while the parties to the Mexican Conventions made reference to 'claims of their respective citizens... for their losses or damages'.<sup>290</sup> Article IX of the Mexico-US General Claims Commission is germane here as well, although it was never actually applied. This provision provided for the Commission's power to order restitution, in which case the respondent state could still elect to pay the value of the property or right rather than 'restore the property or right to the claimant'.<sup>291</sup>

It was recognized that the losses invoked in an international law claim could be the same as those arising from a contract breach.<sup>292</sup> In *Cook I*, Nielsen distinguished between claims under national law and claims concerning 'whether or not there is proof of conduct which is wrongful under international law and which therefore entails responsibility upon a respondent government'.<sup>293</sup> But even though the claim in question—which referred to the failure by the Mexican authorities to pay some money orders—was seen as an international law claim, recovery would be based simply on the loss caused by

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<sup>287</sup> *Fabiani*, 132.

<sup>288</sup> Cf the position under the general international law of diplomatic protection: 'Rights or interests of an individual the violation of which rights causes damage are always in a different plane to rights belonging to a State, which rights may also be infringed by the same act. The damage suffered by an individual is never therefore identical in kind with that which will be suffered by a State; it can only afford a convenient scale for the calculation of the reparation due to the State.' *Chorzów Factory* (Merits), 28. On the position before the Mexican Commissions see Feller (1935) 150 ('the measure of reparation is determined by the injury to the individual').

<sup>289</sup> See e.g. RIAA IX, 115 (US-Venezuela Protocol).

<sup>290</sup> See e.g. RIAA IV, 13 (US-Mexico General Claims Convention). See also Feller (1935) 308.

<sup>291</sup> RIAA IV, 14.

<sup>292</sup> Although the international claim could also include other concepts, such as the 'loss of prestige and moral injury' to the claimant state. *Dickson*, 669.

<sup>293</sup> *Cook I*, 215-216.

the non-payment.<sup>294</sup> The Presiding Commissioner, who apparently concurred that the claim was a proper international reclamation, also agreed on Nielsen's proposed damages award.<sup>295</sup>

The distinction between contract claims and international law claims, even if in a rudimentary stage, had a clear jurisdictional function. It allowed international commissions to exercise jurisdiction, notwithstanding the presence of forum selection clauses submitting disputes under the relevant contracts to national courts. Still, there was no suggestion that the losses involved in the international claims were different in kind from those that could be claimed through contractual causes of action in national courts. Further, the losses invoked in the claims before the Commissions were those suffered by the private party, even though its state was the claimant. If the damages in international claims relating to a contract could be the same as those that could be claimed before the contractual forum, albeit by a different party under a different cause of action, this raised the prospect of double recovery.

## 2 *Double recovery*

In the well-known *Alabama claims* arbitration—decided three decades before the Venezuelan Commissions were set up—the tribunal noted that ‘in order to arrive at an equitable compensation for the damages which have been sustained, it is necessary to set aside all double claims for the same losses’.<sup>296</sup> The arbitral tribunal in *Affaire du Guano* adopted the same approach, stating that ‘Peru is not exposed to pay twice’.<sup>297</sup> The Italy-Venezuelan Commission in *Martini* took for granted the notion that double recovery is not allowed. The Commission found it could dismiss ‘with a word’ several complaints that had been the object of a settlement.<sup>298</sup> Under this settlement, the claimant had received certain concessions in exchange for withdrawing the same claims it was now advancing before the Commission.<sup>299</sup>

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<sup>294</sup> Ibid, 216.

<sup>295</sup> Ibid, 217.

<sup>296</sup> *Alabama claims*, 133.

<sup>297</sup> *Affaire du Guano*, 117. Author's translation (original French).

<sup>298</sup> *Martini*, 661.

<sup>299</sup> Ibid.

As to the Mexican Commissions, as already noted, the rationale behind requiring an ‘allotment’ by the company in the case of claims for losses by persons having an interest in the company was precisely preventing double recovery by the same party and/or double payment for the same loss.<sup>300</sup> In the words of the France-Venezuela Commission in *Esclangon*, ‘[t]he evident goal of this provision [was] to avoid that the legal person of mixed composition may claim more than 100% of the indemnity before two different fora’.<sup>301</sup> That is, regardless of who was claiming and before which tribunal, national or international, all the claims could not amount to more than 100% of the damage. For the France-Venezuela Commission, this was an issue of admissibility (*recevabilité*) to be distinguished from issues pertaining to the merits, such as the amount of damages to which each interested party was entitled or the method to calculate damages.<sup>302</sup>

### III CONCLUSION

Despite their international character and even though treaties created the causes of action, the Venezuelan and Mexican Commissions recognized the reality of an underlying private interest in the claims that the states presented to them. Thus, they acknowledged potential overlaps between international claims and parallel claims before national jurisdictions. Further, and unlike investment tribunals, the Commissions did not develop the idea of the ‘independence’ of claims under international law. This idea, which hinders the integration of applicable international and national/contractual regimes in the resolution of investment treaty claims, is not supported by the Commissions’ decisions. Investment tribunals should take these structural considerations into account when borrowing concepts from these decisions.

Both the Venezuelan and Mexican Commissions asserted their power to examine standing and cause of action after having affirmed their jurisdiction and in analysing the merits of the claims. They often regarded issues such as the impact of forum selection clauses<sup>303</sup> and of local suits overlapping with the international proceedings as not

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<sup>300</sup> *Frederick Adams*, 217; *Esclangon*, 552. In *David Roy*, the Mexico-US Commission stated that, in fixing any damages award, it would consider amounts already received by the claimant. See Feller (1935) 147.

<sup>301</sup> *Esclangon*, 552.

<sup>302</sup> *Ibid.*

<sup>303</sup> The practice of Great Britain and the US considered that forum selection clauses, while not affecting their right to exercise diplomatic protection, were a factor that could be taken into account in deciding whether to intervene. Miles (2013) 51.

affecting the tribunal's jurisdiction, but of potential relevance for determinations on the merits (even if the claimant state before the Commission was typically not party to the relevant contract). In addition, the Commissions sometimes considered the impact of contractual provisions on the international claim in light of the specific damages being claimed (i.e., whether the losses invoked were simply those resulting from contractual breaches).

The Venezuelan and Mexican Commissions were less inclined to accept claims by shareholders for damages suffered by the company than modern investment tribunals. Although this may be partly because of the effect of certain IIA provisions, the Commissions' decisions are still instructive.<sup>304</sup> The Commissions that did exercise jurisdiction over claims concerning shareholders' indirect damages considered the situation of the company at the time of the award, whether shareholders had already been compensated even indirectly through the company, the real extent of shareholder losses considering for example the company's debts, the interests of other stakeholders such as creditors, and similar aspects. Only one damage was involved, regardless of whether it was the shareholders or the company claiming compensation.

The Commissions distinguished between contract claims and claims under international law, applying the idea of 'fundamental basis of the claim (which, however, was deemed not to affect the claims' ultimate merits). The context in which they distinguished between contract and international law claims differed from today's legal setting. Before the Venezuelan and Mexican Commissions only the states could bring claims. Yet, the Commissions were less reluctant to recognize a role for national law than their modern counterparts. National law was deemed as determining certain fundamental points in international claims, such as title to property or restrictions and qualifications over it. This approach was adopted even though the treaties creating the Commissions generally did not expressly require the application of national law.

For the Commissions, the contract claims/international claims distinction was useful in determining whether the case would be heard despite the presence of a forum selection clause, but it did not predetermine either the applicable law or the issue of damages. There was no necessary distinction as regards the damages claimed depending

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<sup>304</sup> Cf Webb Yackee (2016) 459-462 (on the modern significance of the largely forgotten *The Suez Canal Company v Egypt* 1864 arbitration).

on whether it was a contract or an international claim. Further, the Commissions were determined to avoid double recovery. Even if claimed in the context of a ‘genuine’ international claim, those losses that had already been compensated—even if indirectly through an entity other than the claimant and in local proceedings—could not be invoked before the Commissions. This concern went to the claims’ admissibility.



## 4 *Admissibility and Shareholder Standing*

No international tribunals will allow municipal legal fictions of this sort to prevent them doing strict justice.<sup>1</sup>

A number of arbitral decisions, especially since the early 2000s, have discussed jurisdiction over shareholder claims in respect of measures affecting the assets of the local company. Tribunals almost unanimously find that they enjoy jurisdiction over such claims,<sup>2</sup> but their reasoning differs. While some of the differences are probably essentially terminological,<sup>3</sup> the decisions also reveal differences as to issues of substance, with an impact beyond jurisdiction. An international tribunal's jurisdiction over shareholder claims depends on the terms of the applicable legal provisions.<sup>4</sup> Whatever the position under general international law, states may by treaty grant international tribunals jurisdiction to hear all sorts of shareholder claims. States may also confer all sorts of rights on shareholders under international law<sup>5</sup> or make the application of a treaty depend on the nationality or some other characteristic of the shareholders, as the 'real beneficiaries', rather than on the company's position.<sup>6</sup> Indeed, arbitral decisions on shareholder standing have often turned on the interpretation of specific treaty provisions.

The aim of this chapter is to consider to what extent shareholder rights under IIAs are 'independent' or different in substance from the local company's rights. Its purpose

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<sup>1</sup> *Shufeldt*, 1098.

<sup>2</sup> Alexandrov (2005) 45; Wu (2010) 134.

<sup>3</sup> In *Continental*, the tribunal averred that since shareholders invoke their own rights under IIAs the claims 'cannot therefore be defined as indirect claims (or "derivative" claims), as if [the shareholder] was claiming on behalf or in lieu of [the company] in respect of rights granted to the latter by [national law]'. *Continental* (Jurisdiction) [87]. See also *Teinver* (Jurisdiction) [212]; *Total* (Jurisdiction) [81]; *Yukos* (Jurisdiction) [372]. Other tribunals concluded that the same type of claims were in fact 'derivative', because the investor was not claiming that 'the measures were specifically directed against its shareholding', but that they 'had a negative impact on the activities of [the company] and, hence, on the value of [the investor's] shareholding'. *BG* [190]. See also *Gami* [23].

<sup>4</sup> These will basically be treaty provisions and, to a lesser extent, customary international law. But they may also include national law provisions. See Chapter 7.

<sup>5</sup> Cf *Reply of the United States in ELSI*, 380.

<sup>6</sup> See *Mavrommatis* (Jerusalem Concessions), 31-32.

is not, however, to discuss whether the tribunals' interpretations of the relevant provisions were correct and whether, therefore, jurisdiction should have been upheld. In the decision on preliminary objections in *Barcelona Traction*, the ICJ referred to Spain's objection that the acts complained of had affected a company registered in Canada and not the Belgian shareholding interests in the company that were being invoked.<sup>7</sup> The Court observed that this objection, while having a 'preliminary character or aspect', could also be put in another way, which does not directly raise the question of the Applicant Government's *jus standi* – or does so only at one remove. It can be asked whether international law recognizes for the shareholders in a company a separate and independent right or interest in respect of damage done to the company by a foreign government; and if so to what extent and in what circumstances and, in particular, whether those circumstances (if they exist) would include those of the present case.<sup>8</sup>

In considering shareholders' position in international investment law, IIA provisions take centre stage. Yet if and how general international law and IIAs grant shareholders 'a separate and independent right or interest in respect of damage done to the company' remains a relevant debate. Discussing *Barcelona Traction*, Higgins observed that '[t]he relevant question [was] what person or entity has a cause of action in regard to damages sustained by shareholders, resulting from illicit treatment of the company'.<sup>9</sup> A more pressing question today is how to reconcile different causes of action, often held by different persons, with respect to the same damages.

This chapter argues that while it may on occasion be necessary to protect the 'real interests' behind the local company through IIAs, current concepts of independence of shareholder IIA rights should not be applied to the point of obscuring the interrelationship between those rights and the company's rights. These two groups of rights have different legal bases, i.e., IIAs and national law respectively. Yet, in international investment law, shareholder and company rights may apply to the same assets and be thus invoked in relation to the same losses.<sup>10</sup> In order to deal with overlaps between shareholder and company rights, not only IIA provisions but also principles recognized by general international law and national law must be taken into account. Relevant principles include

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<sup>7</sup> *Barcelona Traction (Preliminary Objections)*, 44.

<sup>8</sup> Ibid. Briggs asserted that the reference to the merits here was 'ambiguous' and that the Court could later 'decide the issue of substantive law relating to protection of shareholders without prejudging the merits'. Briggs (1971) 331. See also Mann (1973) 260.

<sup>9</sup> Higgins (1971) 330.

<sup>10</sup> Cremades and Cairns (2005) 14.

the company's legal personality distinct from that of its shareholders and the fact that shareholder rights in relation to the company's assets remain limited (as a corollary of shareholders' limited liability). These principles are grounded in important legal considerations, including the need to avoid affecting legally protected interests of the company and third parties. The extent of overlap between IIA shareholder rights and the company's rights, and what consequences should follow from such overlap, does not pertain to investment tribunals' jurisdiction but to admissibility<sup>11</sup> or the merits.

Section I discusses the cases in which the ICJ was called upon to consider the issue of shareholder rights under international law and treaty provisions, namely *Barcelona Traction*, *Elettronica Sicula (ELSI)*, and *Diallo*. Section II analyses the relevant decisions of investment tribunals,<sup>12</sup> the most influential among these being the three substantive decisions in *CMS v Argentina*. Section III concludes.

## I. SHAREHOLDER RIGHTS AND THE ICJ

The ICJ has had to consider the scope of shareholder rights and their relationship with the local company's rights in three cases. Taken together, *Barcelona Traction*, *ELSI*, and *Diallo* required analyses under general international law, national law, and treaty law. This section identifies relevant principles recognized in the decisions and considers to what extent they are applicable to the admissibility of shareholder IIA claims.

### A Barcelona Traction

#### 1 *The Barcelona Traction case*

Belgium's original claim in *Barcelona Traction* related to a series of measures adopted by Spanish authorities *vis-à-vis* the Barcelona Traction, Light and Power Company, Limited (Barcelona Traction), a company incorporated in Canada.<sup>13</sup> These measures had

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<sup>11</sup> See Chapter 1. In *South West Africa*, the ICJ suggested that considering a claim 'from the point of view of the capacity of the Applicants to advance their present claim' is a question of admissibility. *South West Africa* [76].

<sup>12</sup> Shareholder standing is analysed here from the perspective of general international law, the relevant decisions of the ICJ, and investment tribunals' decisions. There are other international courts and tribunals who have also dealt with the issue. For a discussion under the ECHR see the decisions of the European Court of Human Rights in *Agrotexim* [64-66]; *Olczak* [59]; *Géniteau* [21-23]. Pertinent decisions of the Iran-US Claims Tribunal have generally been taken under article VII.2 of the Claims Settlement Declaration of 19 January 1981 (1 Iran-U.S. Cl. Trib. Rep. 9-12). This provision provides for claims owned 'indirectly' by US nationals 'in the sense that they owned non-American corporations that, in turn, owned property allegedly expropriated by Iran or had contractual claims against Iran'. Aldrich (1996) 88.

<sup>13</sup> *Belgium's Requête* (1958), 3. Belgium's 1962 new application, while still referring to conduct in breach of international law taken *vis-à-vis* Barcelona Traction, stated that the claim's object was the reparation of

allegedly resulted in the company's bankruptcy and liquidation, to the benefit of a Spanish national.<sup>14</sup> Despite the company's place of incorporation, Belgium argued that more than 88% of Barcelona Traction's shares were in Belgian hands.<sup>15</sup> This preponderance of Belgian interests allegedly gave Belgium the right to protect the company as a whole.<sup>16</sup> Belgium complained that in the bankruptcy proceedings the Spanish courts had at times ignored the separate legal personality of the companies controlled by Barcelona Traction.<sup>17</sup> This had been done in order to seize the controlled companies' assets.<sup>18</sup> The Belgian application requested the re-establishment of Barcelona Traction in all its rights and interests, plus damages for all other injuries resulting from the bankruptcy and related proceedings.<sup>19</sup>

From the beginning of the dispute<sup>20</sup> and as an admissibility matter,<sup>21</sup> Spain objected to Belgium's *jus standi* to exercise diplomatic protection with respect to Barcelona Traction.<sup>22</sup> The latter having Canadian nationality, Belgium did not have the right under international law to intervene on the company's behalf.<sup>23</sup> As to the Belgian shareholding interests in Barcelona Traction, aside from strongly contesting the extent to which they had been proved, in Spain's view they were irrelevant to the admissibility of the claim.<sup>24</sup> Even if Belgium had submitted sufficient evidence of these interests, this would have had no impact on Barcelona Traction's Canadian nationality.<sup>25</sup> Paradoxically given its strong reliance on Barcelona Traction's separate legal personality to object to

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the harm suffered by the Belgian shareholders. *Belgium's Requête* (1962), 2. See Briggs (1971) 328-329; Díez de Velasco (1974) 152.

<sup>14</sup> *Belgium's Requête* (1958), 3.

<sup>15</sup> *Belgium's Memorial* (1959), 39.

<sup>16</sup> *Ibid.*, 127.

<sup>17</sup> *Belgium's Requête* (1958), 9, 18. Belgium argued that even if all the shares of a company belong to the same person, this does not make the company's legal personality disappear. *Belgium's Memorial* (1959), 116. See also *Belgium's Memorial* (1962), 43 (referring to a failure to recognize the separate legal personality of the various companies in the claims against Barcelona Traction before Spanish courts).

<sup>18</sup> *Belgium's Requête* (1958), 9, 18.

<sup>19</sup> *Ibid.*, 19.

<sup>20</sup> See *Belgium's Memorial* (1959), 110.

<sup>21</sup> Briggs (1971) 328, 332.

<sup>22</sup> *Spain's Preliminary Objections* (1960), 303.

<sup>23</sup> *Ibid.*

<sup>24</sup> *Ibid.*, e.g. 207, 304, 317, 347.

<sup>25</sup> *Ibid.*, 347.

Belgium's *jus standi*,<sup>26</sup> Spain referred to this company and its sixteen controlled entities as 'formally' being separate and autonomous persons.<sup>27</sup> However, since Barcelona Traction completely dominated the others, they were 'in reality' only one enterprise.<sup>28</sup> This did not mean that the controlled entities' legal personality disappeared.<sup>29</sup> Yet, for example, their independence could not be invoked to prevent the adoption, in Barcelona Traction's bankruptcy proceedings, of measures against the controlled entities' assets.<sup>30</sup>

The ICJ rendered two judgments in the case, following Belgium's new application in 1962.<sup>31</sup> The 1964 judgment rejected the two preliminary objections raised by Spain in relation to the Court's jurisdiction.<sup>32</sup> The remaining two objections—relating to Belgium's standing to claim 'on behalf of Belgian interests in a Canadian company' and to the exhaustion of local remedies—<sup>33</sup>were characterized by Spain<sup>34</sup> and by the Court<sup>35</sup> as going to the admissibility of the claim. These two objections were joined to the merits.<sup>36</sup> In the 1970 judgment, the Court accepted Spain's objection based on Belgium's lack of *jus standi* and rejected the claim without thus 'pronounc[ing] upon any other aspect of the case'.<sup>37</sup>

As to the *jus standi* objection, the ICJ noted that Belgium sought 'reparation for damage allegedly caused to these persons by the conduct, said to be contrary to international law, of various organs of the Spanish State towards [Barcelona Traction] and various other companies in the same group'.<sup>38</sup> The question was thus whether Belgium had the right to exercise diplomatic protection of the Belgian shareholders in the

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<sup>26</sup> Ibid, 386.

<sup>27</sup> *Spain's Counter-Memorial* (1965), 30.

<sup>28</sup> Ibid. Author's translation (original French).

<sup>29</sup> Ibid, 292.

<sup>30</sup> Ibid.

<sup>31</sup> The case relating to Belgium's 1958 Application was removed from the ICJ's list of cases following a request by Belgium not opposed by Spain. *Order of 10 April 1961*, 10.

<sup>32</sup> *Barcelona Traction* (Preliminary Objections), 16-26, 26-40.

<sup>33</sup> Ibid, 16.

<sup>34</sup> Ibid, 12.

<sup>35</sup> Ibid, 41.

<sup>36</sup> Ibid, 46.

<sup>37</sup> *Barcelona Traction* (Second Phase) [102].

<sup>38</sup> Ibid [28].

Barcelona Traction company, incorporated in Canada, when the challenged measures had been taken vis-à-vis the company itself and not any Belgian national.<sup>39</sup> The answer depended on whether ‘a right of Belgium [had] been violated on account of its nationals’ having suffered infringement of their rights as shareholders in a Company not of Belgian nationality’.<sup>40</sup> It was necessary to consider the position in national law concerning ‘the rights of the corporate entity and its shareholders’ and ‘the nature and interrelation of those rights’, as to which ‘international law ha[d] not established its own rules’.<sup>41</sup> The Court further stated:

Notwithstanding the separate corporate personality, a wrong done to the company frequently causes prejudice to its shareholders. But the mere fact that damage is sustained by both company and shareholder does not imply that both are entitled to claim compensation.<sup>42</sup>

It was only when the shareholder’s ‘direct rights’, such as ‘the right to any declared dividend, the right to attend and vote at general meetings, the right to share in the residual assets of the company on liquidation’, had been affected that the shareholder had ‘an independent right of action’.<sup>43</sup> Otherwise, only the national state of the company was authorized to claim under international law.<sup>44</sup>

## 2 *Corporate personality and shareholders’ rights*

Any discussion of the relationship between shareholder and company rights and more particularly of shareholders’ ability to bring claims in relation to measures taken against company assets, cannot be wholly divorced from the idea of the independent personality of corporate entities. The company’s separate personality entails independence of its

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<sup>39</sup> Ibid [32].

<sup>40</sup> Ibid [35].

<sup>41</sup> Ibid [38]. Higgins argued that ‘[t]o assume that because a municipal law creation, a company, is concerned, municipal law necessarily has to be applied where there presently are gaps in international law, is both to deny any law-developing role to the Court and to assume that the functions of international law are the same as those of municipal law’. Higgins (1971) 331. See also Lillich (1971) 524, 529; Mann (1973) 273. Kubiowski criticized *Barcelona Traction* because it ‘unnecessarily limited its inquiry to principles of municipal law, rather than fashioning a new rule for shareholder claims based on international law’. Kubiowski (1991) 225. The reference to ‘fashioning a new rule’ but ‘based on international law’ is ambiguous. Further, the source of the ICJ’s power to fashion new rules rather than apply existing ones is not indicated. See *South West Africa* [89].

<sup>42</sup> *Barcelona Traction* (Second Phase) [44].

<sup>43</sup> Ibid [47].

<sup>44</sup> Ibid [88].

rights *vis-à-vis* shareholders' rights.<sup>45</sup> If such personality does not prevent shareholder claims for measures affecting company assets, how independent really are the rights of the company and shareholders? In his concurring opinion in *Barcelona Traction*, Judge Tanaka advanced that

[t]he concept of juridical personality mainly governs private law relationships. It cannot be made an obstacle to diplomatic protection of shareholders. Concerning diplomatic protection, international law looks into the substance of matters instead of the legal form or technique; it pays more consideration to ascertaining where real interest exists, disregarding legal concepts.<sup>46</sup>

Yet in *Barcelona Traction* the ICJ and, importantly, both parties adopted a different position on 'the concept of juridical personality'.

Although Belgium sought to protect the shareholders, it nonetheless emphasized each company's separate personality.<sup>47</sup> The separation was recognized by the legal systems of all states.<sup>48</sup> Further, the companies' right to preserve their legal individuality, even where they were members of the same group, was 'unanimously recognized', independently of 'economic reality'.<sup>49</sup> The separation extended to each company's assets and was respected even in the event of bankruptcy.<sup>50</sup> Shareholders did not have property rights over the company's assets.<sup>51</sup> Nor could they act as if they were parties to contracts concluded by the company or exercise actions belonging to these parties under the contracts.<sup>52</sup> This did not alter Belgium's conclusion that a breach of international law affecting the company constituted an illegal act *vis-à-vis* both the latter's state and the shareholders' given the purely technical nature of legal personality and the 'solidarity of interests' between shareholders and the company.<sup>53</sup> But this conclusion presented a

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<sup>45</sup> *Diallo* (Jurisdiction), 605; *Barcelona Traction* (Second Phase), 235 (Sep Op, Morelli).

<sup>46</sup> *Barcelona Traction* (Second Phase), 127 (Sep Op, Tanaka). See also *Barcelona Traction* (Preliminary Objections), 62-63 (Sep Op, Wellington Koo).

<sup>47</sup> *Belgium's Reply* (1967), 23.

<sup>48</sup> *Ibid.*

<sup>49</sup> *Ibid.*, 147. Author's translation (original French).

<sup>50</sup> *Ibid.*, 151, 373.

<sup>51</sup> *Ibid.*, 644.

<sup>52</sup> *Ibid.*

<sup>53</sup> *Ibid.*

‘difficulty’ of a ‘practical order’ that international tribunals had to find the way to avoid, namely the respondent state paying twice for the damage caused.<sup>54</sup>

Spain contested Belgium’s submission. Intervention in favour of shareholders was justified only where a breach of international law had been inflicted on them.<sup>55</sup> It was not enough that shareholders may have suffered an indirect damage to their interests as a result of treatment to the company.<sup>56</sup> Shareholders’ rights must have been affected, since the company’s rights and duties were different from those of its shareholders.<sup>57</sup> An abusive taking of one of the company’s assets or the illegal breaking of one of its contracts or concessions affected its rights, not the shareholders’.<sup>58</sup> The separation between the company’s and the shareholders’ assets was the other side of the coin, both of shareholders’ limited liability and of the fact that the company’s assets were the only guarantee of the company’s debts.<sup>59</sup> If compensation due to injury to the company was collected by the shareholders, the company’s assets, which were used first to cover the company’s debts, would not be re-established.<sup>60</sup>

In its judgment, the Court considered the issue of shareholders’ rights material. It was necessary to determine whether the prejudice allegedly suffered by the Belgian shareholders resulted from the breach of obligations of which ‘they were the beneficiaries’.<sup>61</sup> The ICJ noted that

[t]he concept and structure of the company are founded on and determined by a firm distinction between the separate entity of the company and that of the shareholder, each with a distinct set of rights. The separation of property rights as between company and shareholder is an important manifestation of this distinction. So long as the company is in existence the shareholder has no right to the corporate assets.<sup>62</sup>

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<sup>54</sup> Ibid, 655 (citing to *Reparation for Injuries*, 186). In Belgium’s view, although the two available claims would be brought by different states, the damage was the same and was not payable twice. Relatedly, Belgium observed that Barcelona Traction’s Belgian shareholders had ‘separate and independent rights and interests to assert’, ‘in the absence of reparation to the Company for the damage inflicted on it, from which they would have benefited at the same time as itself’. *Barcelona Traction* (Second Phase), 26.

<sup>55</sup> *Spain’s Preliminary Objections* (1960), 386.

<sup>56</sup> Ibid.

<sup>57</sup> Ibid.

<sup>58</sup> *Spain’s Counter-Memorial* (1965), 642.

<sup>59</sup> Ibid, 650.

<sup>60</sup> Ibid, 652.

<sup>61</sup> *Barcelona Traction* (Second Phase), 26.

<sup>62</sup> Ibid, 34.



Indeed, shareholder rights in relation to the company and its assets remained limited, this being a corollary of their limited liability.<sup>63</sup>

Thus, *Barcelona Traction* stands clearly for the proposition that ‘international law acknowledges the general separateness of corporate entities at the national level’.<sup>64</sup> Both Belgium and Spain recognized and invoked this principle of national law,<sup>65</sup> albeit for different purposes. Despite the existence of dissenting opinions, the principle was also recognized by all of the judges.<sup>66</sup> And even writers generally disapproving *Barcelona Traction*’s approach as to the scope of shareholders’ rights, have conceded companies’ separate personality.<sup>67</sup> The ICJ also referred to certain corollaries of the separation principle, such as the notion that ordinarily the shareholder has no right to the corporate assets. The separation between the company and its shareholders underscored in *Barcelona Traction*<sup>68</sup> is related to important legal considerations. First, to the notion that limitations on shareholder rights are ‘a corollary of the limited nature of their liability’. Second, to the need to compensate the company rather than the shareholders in case of injury to the former, because of the company assets being the only guarantee of its debts (which in turn involves the rights of third parties).

Shareholders may have the right under IIAs to claim for harm to the corporate entities’ assets, but ‘the fact of those entities (and any associated liabilities) cannot be entirely disregarded’.<sup>69</sup> To the extent IIAs are construed as bypassing the separation between companies and shareholders for purposes of jurisdiction over shareholder indirect claims,<sup>70</sup> the interests protected by corporate law principles connected to such separation, also recognized by customary international law, need to be considered. Alternatively, tribunals could consider them when assessing damages.<sup>71</sup>

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<sup>63</sup> Ibid, 35.

<sup>64</sup> ILC Commentaries, 48. See also Jiménez de Aréchaga (1965) 75-76.

<sup>65</sup> Briggs (1971) 338.

<sup>66</sup> Staker (1991) 157.

<sup>67</sup> See Higgins (1971) 331; Juratowitch (2011) 322.

<sup>68</sup> Smutny (2009) 364.

<sup>69</sup> Ibid, 376.

<sup>70</sup> However, shareholders’ direct right of action under IIAs does not justify discarding the distinction between shareholders and the company. Müller (2015) 15.

<sup>71</sup> Ibid. Broadly speaking, damages considerations (such as avoiding double recovery) may constitute admissibility grounds preventing a decision on the claim’s ultimate merits. See Chapter 1.

This thesis proposes to take these interests into account at the admissibility stage to prevent potential double recovery and injury to third-party rights.<sup>72</sup> Under this approach, not all shareholder indirect claims are inadmissible. *Barcelona Traction* itself notes that ‘the independent existence of the legal entity cannot be treated as an absolute’.<sup>73</sup> Yet the tension between the company’s rights over its assets and shareholder claims seeking damages for losses to those same assets must be recognized. And it must be dealt with applying recognized legal principles found both in international and national law.

### 3 *Piercing of the veil and equitable considerations*

Investment tribunals have routinely ‘lifted the veil’ in the interest of shareholders, mostly on the basis of the wide definition of the term investment in IIAs.<sup>74</sup> The decisions do not expressly apply the lifting of the veil concept, but arrive at one of its possible outcomes by allowing shareholders to bring claims against measures taken vis-à-vis the company’s assets. By contrast, the ICJ in *Barcelona Traction* stated that the lifting of the veil in the interest of shareholders could be justified in international law but, just like in national legal systems, ‘only in exceptional circumstances’.<sup>75</sup>

Although both Belgium and Spain acknowledged companies’ independent legal personality in *Barcelona Traction*, neither argued that corporate separateness was absolute. This was clear in Belgium’s main case, which, it was argued, always had the protection of the Belgian shareholding interests in mind.<sup>76</sup> The real issue was not the protection of the company itself but of the legal and natural persons that had invested in it and had suffered losses as shareholders because of measures taken against the company.<sup>77</sup> It was necessary to look at ‘the real party in interest’<sup>78</sup> and distinguish the company from its constitutive parts, international law in this field being essentially inspired by principles of equity.<sup>79</sup>

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<sup>72</sup> Waibel (2014) 78.

<sup>73</sup> *Barcelona Traction* (Second Phase), 39.

<sup>74</sup> See Schreuer (2005) 19; *AES* [85-88]; *RREEF* (Jurisdiction) [159].

<sup>75</sup> *Barcelona Traction* (Second Phase) [57].

<sup>76</sup> *Belgium’s Memorial* (1962), 148.

<sup>77</sup> *Ibid*, 150.

<sup>78</sup> *Belgium’s Reply* (1967), 710.

<sup>79</sup> *Belgium’s Memorial* (1962), 155. Belgium echoed here Judge Huber’s words in *Ziat Ben Kiran*. *Ziat Ben Kiran*, 729.

To justify certain judicial measures taken in Barcelona Traction's bankruptcy proceedings with respect to assets of the company's subsidiaries, Spain argued that the interposition of these subsidiaries' legal personality was part of a fraud.<sup>80</sup> To the extent that the subsidiaries' assets were controlled entirely by Barcelona Traction, such assets had to be used to repay the debts incurred by the latter in the exercise of its power.<sup>81</sup> Respect for legal personality found an exception when it was necessary to protect the rights of third parties.<sup>82</sup> It could not be used to conceal attacks 'against the general interest, justify what is illegal, protect fraud or defend crime'.<sup>83</sup> Barcelona Traction having abused its legal personality by interposing a group of subsidiaries between it and what really were its own assets,<sup>84</sup> 'technical considerations [could] not prevent substantial justice from being done'.<sup>85</sup>

Referring to municipal law, the Court found that 'the process of "lifting the corporate veil" or "disregarding the legal entity" [had] been found justified and equitable in certain circumstances or for certain purposes'.<sup>86</sup> The company's legal personality could be disregarded when it was necessary to 'provide protective measures and remedies in the interests of those within the corporate entity as well as of those outside who have dealings with it'.<sup>87</sup> The ICJ mentioned creditors and persons having contractual ties with the company as third parties who could need protection against the misuse of the legal personality.<sup>88</sup> Lifting the veil could perform a similar function in international law.<sup>89</sup>

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<sup>80</sup> *Spain's Counter-Memorial* (1965), 293. According to Spain, however, even in the case of fraud the legal personality does not disappear and its independence has to be respected. *Ibid.*

<sup>81</sup> *Ibid.*, 299.

<sup>82</sup> *Ibid.*, 301.

<sup>83</sup> *Ibid.*, 302. Author's translation (original French).

<sup>84</sup> *Ibid.*, 306.

<sup>85</sup> *Spain's Counter-Memorial* (1968), 836 Author's translation (original French).

<sup>86</sup> *Barcelona Traction* (Second Phase) [56]. The Privy Council accepted that lifting the corporate veil is possible only in exceptional circumstances in English law while noting, however, that 'there may not always be a precise equation between factors relevant to the lifting of the corporate veil under domestic and international law'. *La Générale des Carrières* [23-27]

<sup>87</sup> *Barcelona Traction* (Second Phase) [56].

<sup>88</sup> *Ibid.*

<sup>89</sup> *Ibid.* [58].

Relevantly, the ICJ mentioned the case where remedies through the company were not available.<sup>90</sup>

By contrast, investment tribunals have considered the availability of other remedies to be irrelevant for purposes of assessing jurisdiction over shareholder indirect claims, due to the independence of treaty claims from national law remedies.<sup>91</sup> For non-jurisdictional purposes, however, the idea that shareholder IIA rights are autonomous is, as discussed below, questionable. The availability of corporate remedies is a relevant admissibility consideration, first, because of double recovery risks. Second, because to the extent shareholder IIA claims affect the possibilities of recovery in subsequent claims by the local company, the rights of third parties with claims against the latter may be harmed.

The reasoning justifying shareholder indirect claims under IIAs is often similar to Belgium's appeal in *Barcelona Traction* to protect 'the real party in interest'.<sup>92</sup> This has been achieved. But investment tribunals rarely consider the rights and interests of persons having dealings with the company,<sup>93</sup> including the third parties who the Court mentioned specifically, such as creditors.<sup>94</sup> Similarly, investment tribunals do not consider the company's interests. Yet shareholder claims' potential implications for the company and third parties are relevant legal considerations stemming from national and international law. These implications could also be seen as considerations of 'equity' or 'substantial justice', concepts to which both parties and the Court referred in *Barcelona Traction*<sup>95</sup> and that 'stress the need for a less inelastic treatment of certain of the issues of admissibility involved'.<sup>96</sup> Further, in international investment law the veil is lifted only in favour of shareholders, since they are not made responsible for the company's liabilities.<sup>97</sup> When this entails that legitimate claims of third parties may not be satisfied,

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<sup>90</sup> Ibid [66]. See also *Agrotexim* [66]; *Géniteau* [23].

<sup>91</sup> Gaukrodger (2013) 27.

<sup>92</sup> See e.g. *Azurix* (Jurisdiction) [64].

<sup>93</sup> The same may be said of scholarly writing. Gaukrodger (2013) 29-30.

<sup>94</sup> *Barcelona Traction* (Second Phase) [56].

<sup>95</sup> Ibid [92-101]. See also *ibid*, 84 (Sep Op, Fitzmaurice) (quoting the *Cayuga Indians* case reference to '[t]he same considerations of equity that have repeatedly been invoked by the courts where strict regard to the personality of a corporation would lead to inequitable results').

<sup>96</sup> Ibid, 85 (Sep Op, Fitzmaurice).

<sup>97</sup> Shareholders pursuing IIA claims rarely risk facing counterclaims. First, because IIAs generally do not establish obligations for investors. Second, investment treaty tribunals' jurisdiction over host state claims

for example because the local company is in liquidation, investment tribunals should decide, as an admissibility matter, whether granting shareholders all the compensation (in proportion to their shareholdings) for injury to the company's assets is justified.

B      ELSI, Diallo, and the Barcelona Traction principles

1      *Overview of the decisions*

(a) *ELSI*

In *ELSI*, the US argued that Italy had 'violated the Treaty of Friendship, Commerce and Navigation between the United States and the Republic of Italy and the supplementary agreement to that treaty, through Italy's actions with respect to an Italian company wholly owned by two United States corporations'.<sup>98</sup> The dispute derived from the Italian government's requisition of the plant and related assets of Elettronica Sical S.p.A., an Italian company wholly owned by the US corporations.<sup>99</sup> The claim advanced that the requisition 'was intended to, and did in fact, prevent [the US corporations] from proceeding with their decision to conduct an orderly liquidation of ELSI'.<sup>100</sup> This had caused significant losses<sup>101</sup> and thus the US requested full compensation for the damages suffered by the US corporations as a result of the requisition and other actions and omissions of Italy.<sup>102</sup>

Italy 'fully recognize[d] the Court's jurisdiction over the dispute in so far as it relate[d] to the interpretation and application of the 1948 Treaty and the 1951 Supplementary Agreement' and otherwise refrained from raising jurisdictional objections.<sup>103</sup> It did argue, however, that the claim was inadmissible because the two US corporations had not exhausted local remedies as required by international law.<sup>104</sup> Further, on the merits, Italy denied any wrongdoing on the part of Italian authorities.<sup>105</sup>

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stemming from contractual and national law instruments is not accepted because they are not treaty claims. See Chapter 6.

<sup>98</sup> *Cf Application of the United States*, 3.

<sup>99</sup> *Ibid*, 4.

<sup>100</sup> *Ibid*.

<sup>101</sup> *Ibid*.

<sup>102</sup> *Memorial of the United States*, 44.

<sup>103</sup> *Counter-Memorial of Italy*, 26.

<sup>104</sup> *Ibid*, 27.

<sup>105</sup> *Ibid*, 30.

The ICJ's Chamber deciding the case was not convinced, in a case where 'there ha[d] in fact been much resort to the municipal courts', that any remedy remained to be exhausted and thus rejected Italy's admissibility objection.<sup>106</sup>

The Chamber proceeded to consider the merits of a claim invoking damages to the shareholders due to measures taken *vis-à-vis* the company. The suggestion, however, that *ELSI* was part of 'a fundamental change of the applicable concepts under international law and State practice' is incorrect.<sup>107</sup> A better explanation is that the claim in *ELSI* involved shareholder rights under *Barcelona Traction*'s exposition of the law.<sup>108</sup> In fact, in *ELSI* the 'essence of the Applicant's claim' throughout was that the US corporations had been 'by the requisition deprived of the right, and of the practical possibility, of conducting an orderly liquidation of *ELSI*'s assets'.<sup>109</sup> The US's case was premised on a breach of shareholders' rights and was thus consistent with *Barcelona Traction*.<sup>110</sup> Further, it is not clear why the *ELSI* case would reflect a change in the general international law principles recognized in *Barcelona Traction* given that the Chamber's decision hinged on the interpretation of specific provisions of an FCN Treaty.<sup>111</sup>

(b) *Ahmadou Sadio Diallo*

The *Diallo* case involved claims by the Republic of Guinea against the Democratic Republic of Congo (DRC). The claims arose out of the arbitrary arrest, expulsion, and other degrading treatment of Mr Diallo, a Guinean national.<sup>112</sup> It was also alleged that Mr Diallo had been deprived of rights of ownership and management in two Congolese companies he had founded. This had prevented him from pursuing recovery of debts owed to him and to his companies. Non-payment by the DRC of its own debts to Mr Diallo and his companies was also advanced.<sup>113</sup> The DRC challenged the admissibility of the case, arguing that Guinea lacked standing because it was seeking to protect rights that belonged

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<sup>106</sup> *ELSI*, 47-48.

<sup>107</sup> *CMS Jurisdiction* [44]; Schlemmer (2008) 81.

<sup>108</sup> Kubiowski (1991) 231; Crawford (2006) 37; Douglas (2009) 410.

<sup>109</sup> *ELSI*, 52.

<sup>110</sup> Murphy (1991) 418.

<sup>111</sup> Smutny (2009) 372; Baumgartner (2016) 31; *Diallo* (Jurisdiction), 614.

<sup>112</sup> *Diallo* (Jurisdiction), 588.

<sup>113</sup> *Ibid.*

to the Congolese companies, Africom-Zaire and Africontainers-Zaire, not to Mr Diallo.<sup>114</sup> The Court accepted the admissibility of the case as it concerned ‘Mr. Diallo’s rights as an individual’<sup>115</sup> and as ‘*associé* of the two companies’,<sup>116</sup> but not ‘as it relate[d] to the exercise of diplomatic protection with respect to Mr. Diallo “by substitution” for the Congolese companies and in defence of their rights’.<sup>117</sup> The Court confirmed the basic principles of the *Barcelona Traction* decision,<sup>118</sup> finding that

[w]hat matters, from the point of view of international law, is to determine whether or not [the different forms of legal entity] have a legal personality independent of their members. Conferring independent corporate personality on a company implies granting it rights over its own property, rights which it alone is capable of protecting.<sup>119</sup>

It thus pronounced that the position in general international law on shareholder rights had not changed 40 years after *Barcelona Traction*. In the meantime, thousands of IIAs expressly protecting shareholders had been signed. And it occurred in a case involving companies incorporated in the respondent state, even though the Court in *Barcelona Traction* had hinted that a special rule could apply in that case.<sup>120</sup> Further, the evolution that may be noted from *Barcelona Traction* to *Diallo* is a more precise identification of the relevant national law for distinguishing between shareholder and company rights (*Barcelona Traction* having been criticized for relying on national law rules). In this light, the outcome in *Diallo* is a strong indication of the continued vitality of the company’s independent existence in international law.

## 2 *Relevance of Barcelona Traction for international investment law*

In recent years, it has been argued that the totality of the practice demonstrates that the notions adopted in *Barcelona Traction* are no longer applicable in international law.<sup>121</sup> And, more particularly, that after the conclusion of a high number of IIAs the decision in

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<sup>114</sup> Ibid, 596.

<sup>115</sup> Ibid, 597-601.

<sup>116</sup> Ibid, 601-610.

<sup>117</sup> Ibid, 610-616.

<sup>118</sup> Ibid, 614.

<sup>119</sup> Ibid, 605.

<sup>120</sup> Juratowitch (2011) 287.

<sup>121</sup> Orrego Vicuña (2000) 359. But see Tams (2005) 1.

*Barcelona Traction* no longer reflected international law.<sup>122</sup> This position appears difficult to maintain after the 2007 and 2010 ICJ decisions in *Diallo*.<sup>123</sup> A more subtle view contends that, BITs being the *lex specialis* on shareholder rights in international investment law, *Barcelona Traction* has been rendered largely irrelevant or inapposite in this latter field.<sup>124</sup> A strong version of this view was asserted by the arbitral tribunal in *Suez I*:

... *Barcelona Traction* is not controlling in the present case. That decision, which has been criticized by scholars over the years, concerned diplomatic protection of its nationals by a State, an issue that is in no way relevant to the current case. Unlike the present case, *Barcelona Traction* did not involve a bilateral treaty which specifically provides that shareholders are investors and as such are entitled to have recourse to international arbitration to protect their shares from host country actions that violate the treaty.<sup>125</sup>

This view is often complemented with the idea that *Barcelona Traction* ‘was concerned only with the exercise of diplomatic protection’ and in a ‘particular triangular setting’ (i.e., involving the company’s state of incorporation, the shareholders’ state of nationality, and the host state).<sup>126</sup> This particular setting presented a ‘significantly different factual scenario’ from one where the claim is brought directly by a foreign investor against the host state.<sup>127</sup> Further, states’ right to exercise diplomatic protection under general international law is different from the rights IIAs confer to investors, including shareholders.<sup>128</sup>

It is no doubt true that *Barcelona Traction* involved an exercise of diplomatic protection.<sup>129</sup> However, in its first judgment in the case the ICJ noted that ‘the question of the *jus standi* of a government to protect the interests of shareholders as such, is itself merely a reflection, or consequence, of the antecedent question of what is the juridical

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<sup>122</sup> Laird (2005) 77.

<sup>123</sup> The foundations of the prevailing notions on shareholder standing in international investment law were laid before the jurisdictional decision in *Diallo*, essentially starting with the decision on jurisdiction in *CMS* rendered in 2003. See Orrego Vicuña (2000) 359.

<sup>124</sup> See e.g. *Pan American* [217]; *Total* (Jurisdiction) [78]; *CMS* (Annulment) [69]; *El Paso* (Jurisdiction) [209].

<sup>125</sup> *Suez 03/17* (Jurisdiction) [50]; see also *Suez 03/19* (Jurisdiction) [50].

<sup>126</sup> *CMS* (Jurisdiction) [43].

<sup>127</sup> *Daimler* [90].

<sup>128</sup> Alexandrov (2005) 27; *Rompetrol* (Jurisdiction) [86-93], 101. See also *Serafin* [173] (diplomatic protection is inconsistent with the direct remedy available to investors under IIAs).

<sup>129</sup> *CMS* (Annulment) [69].



situation in respect of shareholding interests, as recognized by international law'.<sup>130</sup> The Court added that, since Belgium was not merely exercising diplomatic protection but making a claim before an international tribunal, determining whether international law conferred to shareholders the rights in question was 'of the essence of the matter'.<sup>131</sup> In this regard, the *Teinver* tribunal correctly noted that 'to determine whether Belgium had a right to bring its case, the Court had to first address the scope of the Belgian nationals' rights as shareholders'.<sup>132</sup> The 'antecedent question' of shareholder rights in international law was different from the conditions applicable to standing in diplomatic protection.<sup>133</sup>

Whether states, for jurisdictional purposes, intend to 'deviate from *Barcelona Traction*' depends on the construction of the applicable treaty's provisions.<sup>134</sup> Investment tribunals have often found, basing themselves on the definition of 'investment' in the relevant treaty, that IIAs allow 'shareholders to bring claims for harms to their investments in locally incorporated companies'.<sup>135</sup> But the fact that shares are a protected investment in BITs and that this or other similar factors suffice to affirm jurisdiction, does not warrant the conclusion that 'the juridical situation in respect of shareholding interests' under general international law is otherwise irrelevant for international investment law. The ICJ's views on the legal position of shareholders, as expounded in *Barcelona Traction*, *ELSI*, and *Diallo*, remain relevant, not least for the purposes of admissibility and the 'ultimate merits' of the claim.

First, *Barcelona Traction* treated such shareholders' 'juridical situation' not as a jurisdictional point and not even 'one simply of the admissibility of the claim, but of substantive legal rights pertaining to the merits'.<sup>136</sup> Second, to the extent that IIAs are *lex specialis* vis-à-vis customary law as regards shareholder rights, this does not mean that

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<sup>130</sup> *Barcelona Traction* (Preliminary Objections), 45.

<sup>131</sup> *Ibid.*

<sup>132</sup> *Teinver* (Jurisdiction) [216].

<sup>133</sup> Müller (2015) 16.

<sup>134</sup> *El Paso* (Jurisdiction) [209]. In *Gami*, the US argued, referring to *Barcelona Traction*, that the NAFTA provisions allowing claims by controlling shareholders on behalf of an enterprise did 'not reflect "an intent to derogate from the rule that shareholders may assert claims only for injuries to their interests and not for injuries to the corporation"'. *Gami* [29]. The tribunal rejected this argument denying that *Barcelona Traction* was applicable outside the diplomatic protection context. *Ibid* [30].

<sup>135</sup> *Daimler* [91].

<sup>136</sup> *Barcelona Traction* (Preliminary Objections), 44. See also *Barcelona Traction* (Second Phase), 65 (Sep Op, Fitzmaurice); Briggs (1971) 345; Müller (2015) 19.

the two cannot coexist, at least as long as there is no ‘actual inconsistency between them, or else a discernible intention that one provision is to exclude the other’.<sup>137</sup> Although the extent to which general rules are displaced depends on the interpretation of the applicable treaty as the *lex specialis*,<sup>138</sup> the inclusion of shares as a protected investment or of shareholders as protected investors does not justify the complete displacement of the general international law dealing with shareholders. Third, it is uncontroversial that customary international law may be of ‘particular relevance to the interpretation of a treaty’.<sup>139</sup> Investment tribunals routinely apply rules of general international law, both for jurisdictional and merits purposes.<sup>140</sup> Furthermore, IIAs generally include international law in any provision on the law applicable to investor-state disputes. In light of this express reference, relying on shares’ protected status under IIAs to disregard international law principles appears even less justified.

Thus, investment tribunals cannot brush aside the analysis in *Barcelona Traction* just because it was a diplomatic protection case.<sup>141</sup> As a general matter, it is true that in international investment law diplomatic protection has been replaced by investor-state arbitration and other dispute settlement mechanisms.<sup>142</sup> However, just because the affected entity—rather than its national state—can now bring an international claim directly does not make *Barcelona Traction*’s treatment of the underlying shareholder and company rights irrelevant to investment arbitration.<sup>143</sup> The interrelation of those rights remains a relevant question because IIAs, general international law, and national law may

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<sup>137</sup> ILC Commentaries, 140.

<sup>138</sup> Ibid.

<sup>139</sup> ILC Fragmentation Report [20] (referring to Article 31(3)(c) of the Vienna Convention on the Law of the Treaties). See also *AAPL* [39]; *Yukos* (Jurisdiction) [415].

<sup>140</sup> Investment tribunals have relied on *Barcelona Traction* itself. See *Tokios Tokelès* (Jurisdiction) [53-56] (*Barcelona Traction* is the ‘seminal case’ on the equitable doctrine of ‘veil piercing’). The fact that *Barcelona Traction* was a diplomatic protection case did not prevent the *Tokios Tokéles* tribunal from relying on it. For a view that *Barcelona Traction* is not ‘directly applicable’ in investment treaty arbitration but may be taken into account see *Orascom* [290-296].

<sup>141</sup> For a recent instance of an investor invoking *Barcelona Traction* on corporate nationality aspects in an investment arbitration, see *Tenaris* [131].

<sup>142</sup> Schreuer (2005) 2. Importantly, the reason to exclude diplomatic protection during the pendency of an ICSID arbitration was apparently to protect ‘the host State from exposure to the risk of multiple claims’. History ICSID Convention, II-1, 348. See also *ibid.*, 527.

<sup>143</sup> Relatedly, it has been noted that ‘in the course of the [ICSID] Convention’s drafting, it was repeatedly pointed out, especially by the Chairman (Mr. Broches), that an investor before an ICSID tribunal would have identical rights to those of its government exercising diplomatic protection’. Schreuer (2009) 613. See also History ICSID Convention, II-1, 432.

grant rights and causes of action to the company and its shareholders over the same assets and losses. Although for jurisdictional purposes the impact of IIAs on shareholder standing is undeniable, there is no evidence that IIAs otherwise seek to derogate from all international and national law principles bearing on the position of shareholders and companies.<sup>144</sup> On the contrary, these two legal systems are generally part of the applicable law in investment treaty arbitration.<sup>145</sup> In *HICEE* the tribunal took a strong stance on the impact of the applicable IIA asserting that

the admissibility of shareholder claims depends upon the provisions of the investment protection treaty in question, and [IIAs] very frequently make provision to allow for shareholder claims, either explicitly or by necessary implication. The position, in other words, is controlled by the treaty.<sup>146</sup>

Yet in deciding that position and while acknowledging ‘investment treaty jurisprudence’ on shareholder standing, the *HICEE* tribunal, with reference to *Barcelona Traction* and *Diallo*, also took into account ‘the default position in international law that the corporate form is recognized as legally distinct from the shareholders, and confers on the corporate entity the capacity to assert claims for damage suffered to it or its property’.<sup>147</sup>

Douglas argued, however, that a distinction should be made between diplomatic protection and investment treaty arbitration.<sup>148</sup> The latter involves an investor bringing ‘a cause of action based upon the vindication of its own rights rather than those of its national state’.<sup>149</sup> In contradistinction, in diplomatic protection the state ‘is not an agent of its national who has a legally protected interest at the international level; the state is rather seeking redress for the breach of an obligation owed to itself’.<sup>150</sup> But although IIA rights are held by the investor directly, it does not follow that international law principles recognized in the diplomatic protection context are irrelevant in investment treaty arbitration. The traditional position was that in diplomatic protection ‘a State is in reality

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<sup>144</sup> For example, international investment law is premised on the idea of legal personality under national law. See e.g. the reference in article 25 of the ICSID Convention, which defines the scope of ICSID’s jurisdiction, to ‘any juridical person’; *Isolux* [667].

<sup>145</sup> See Chapter 7.

<sup>146</sup> *HICEE* [147] (footnotes omitted).

<sup>147</sup> *Ibid* (footnote omitted).

<sup>148</sup> Douglas (2009) 32.

<sup>149</sup> *Ibid*.

<sup>150</sup> *Ibid*, 14.

asserting its own rights – its right to ensure, in the person of its subjects, respect for the rules of international law’.<sup>151</sup> This view has not escaped criticism in recent years.<sup>152</sup>

While some of the rules applicable in the diplomatic protection field may not be amenable to application outside a state-state relationship, there is no reason to conclude that this is true in all cases. And the fact that IIAs have

substituted for diplomatic protection and may even prohibit its exercise by the States that are parties to them, does not mean that the basic principles have also been automatically derogated as it is rather the means for materializing an international claim that have changed but not in all aspects its substantive requirements.<sup>153</sup>

Nothing in the nature of the general international law rules on the position of shareholders prevents, as a matter of principle, their application in an investor-state dispute under an IIA. Nor does the shareholders’ right to directly sue the host state under IIAs completely exclude the relevance of the general international law on the scope of companies’ and shareholders’ substantive rights.<sup>154</sup>

### 3 *Shareholder rights and overlapping claims in ELSI*

#### (a) *Overview*

For admissibility purposes, on the one hand, the Chamber in *ELSI* discussed the relationship between the international claim, brought on behalf of shareholders, and local claims filed by *ELSI* or on its behalf. On the other hand, for merits purposes, the Chamber had to consider the scope of shareholder rights under an FCN, generally considered as predecessors of modern BITs.<sup>155</sup> Both aspects are relevant here. First, regarding the relevant criteria to acknowledge overlaps between international and national law claims and the potential impact of such overlaps on international proceedings. Second, as to the Chamber’s approach to shareholders’ treaty-protected interests over assets owned by the local company under national law.

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<sup>151</sup> *Mavrommatis Palestine Concessions*, 12.

<sup>152</sup> Orrego Vicuña (2000) 344; Dugard (2010) 1052; Crawford (2013) 77 (in diplomatic protection ‘a state is enforcing the rights of the individual at one remove.’).

<sup>153</sup> *Société Générale* [108]. See also History ICSID Convention, II-1, 259 ([‘B]y giving the investor the right to go before a tribunal’, the ICSID Convention ‘implied that the investor would have the same right as his Government would have had if it had come before the tribunal on his behalf’).

<sup>154</sup> *RREEF* [119].

<sup>155</sup> Vandeveld (1992) 14-22; Voss (2011) 51.

With respect to admissibility, in order to reject the objection on the alleged failure by the US corporations to exhaust local remedies, the Chamber relied on proceedings brought by ELSI and by the trustee in bankruptcy on the latter's behalf.<sup>156</sup> Since the loss claimed in the international proceedings resulted from measures affecting 'the manner of disposing of ELSI's assets', it was for ELSI—and after the bankruptcy, for the trustee—to pursue any available local remedy.<sup>157</sup> This meant that when comparing the claim before the Chamber with the Italian proceedings 'of course, the parties were different'.<sup>158</sup> What was relevant, however, was that the claims for damages before Italian courts related to the 'causal link between the requisition order and the company's bankruptcy'.<sup>159</sup> Hence, the 'substance of the claim' was 'essentially' the same as that of the claim before the Chamber,<sup>160</sup>

for both claims turn[ed] on the allegation that the requisition, by frustrating the orderly liquidation, triggered the bankruptcy, and so caused the alleged losses.<sup>161</sup>

Thus, although apparently the US corporations had brought no proceedings before Italian courts,<sup>162</sup> no local remedy remained which these entities 'independently of ELSI, and of ELSI's trustee in bankruptcy, ought to have pursued and exhausted'.<sup>163</sup>

Regarding the merits, in construing the FCN provisions on takings the Chamber observed it was doubtful whether they 'could be extended to include even a "taking" of an Italian corporation in Italy, of which, strictly speaking, [the US corporations] only held the shares'.<sup>164</sup> However, the language extending the protection to 'interests held directly or indirectly' was intended to resolve these doubts in that shareholders' interests 'in the assets of a company, and in their residuary value on liquidation, would appear to fall in the category of the "interests" to be protected' under the FCN.<sup>165</sup> As to a provision

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<sup>156</sup> *ELSI*, 44-48.

<sup>157</sup> *Ibid*, 44-45.

<sup>158</sup> *Ibid*, 46.

<sup>159</sup> *Ibid*, 45.

<sup>160</sup> *Ibid*, 45-46.

<sup>161</sup> *Ibid*, 46.

<sup>162</sup> Murphy (1991) 404.

<sup>163</sup> *ELSI*, 48.

<sup>164</sup> *Ibid*, 70.

<sup>165</sup> *Ibid*.

‘principally concerned with ensuring the right “to acquire, own and dispose of immovable property or interests therein...”’,<sup>166</sup> the Chamber was sympathetic to the US’s contention ‘that “immovable property or interests therein” is a phrase sufficiently broad to include indirect ownership of property rights held through a subsidiary that is not a United States corporation’.<sup>167</sup> This interpretation was more consistent with the FCN treaty’s purpose.<sup>168</sup>

(b) *The significance of the Chamber’s findings in investment arbitration*

The Chamber’s observations on the scope of shareholder rights under the FCN provisions are consistent with the approach of investment tribunals to similar IIA provisions.<sup>169</sup> In particular, the idea that the protection of indirectly held interests—common in modern IIAs—may mean that shareholder interests over the company’s assets are also protected is noteworthy.<sup>170</sup> But in *ELSI* the ICJ rejected all claims on the merits.<sup>171</sup> Thus, the potential need to consider how to reconcile overlapping claims of the company and of its shareholders over the same assets did not arise.<sup>172</sup> In this respect, however, the Court’s ‘substantive’ rather than formalistic approach to Italy’s admissibility objection is relevant. Despite differences in the persons involved and the applicable law, the Chamber found that certain Italian proceedings involved ‘in substance, essentially the same claim brought before the Chamber by the United States’.<sup>173</sup> In disposing of an admissibility objection relating to parallel claims, the Chamber took into account the substance of the claims. The fact that one was a national law claim involving the local company and the other an international claim referring to the shareholders<sup>174</sup> did not alter the Chamber’s conclusion.

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<sup>166</sup> Ibid, 77.

<sup>167</sup> Ibid, 79.

<sup>168</sup> Ibid. See also Mann (1992) 99.

<sup>169</sup> In light of the facts of the case, the Chamber did not see the need to fully develop its views on some interpretative points. *ELSI*, 71.

<sup>170</sup> Discussing *ELSI*, Murphy argued that by protecting directly or indirectly owned investments and interests in assets ‘the BITs render irrelevant the debate about the distinction between the rights and the interests of the shareholder’. Murphy (1991) 445.

<sup>171</sup> *ELSI*, 81.

<sup>172</sup> Smutny (2009) 370.

<sup>173</sup> Murphy (1991) 413.

<sup>174</sup> In *ELSI* the international claim was pursued by the state, consistent with the position under general international law. In investment arbitration, overlapping claims usually involve related entities, i.e., the local company and its foreign shareholders. In many modern arbitrations, thus, the Chamber’s rationale is at least equally justified.

As a rule, international law does not exclude simultaneous proceedings involving similar claims, provided there are ‘separate bases of protection, each of which is valid’.<sup>175</sup> When the ICJ observed that this was the position, it referred to two international law claims by the same person. Arguably, the same applies to an international law claim by one person and a national law claim by another (even if the two persons are related). Yet, parallel litigation over the same facts (even if the parties are not formally identical) increases the time and cost of litigation and may lead to inconsistencies and unfairness.<sup>176</sup> While these problems are generally recognized, it is more complex to identify the solutions available to international tribunals.<sup>177</sup> Here, the decision in *ELSI* is important because to establish the impact of parallel proceedings on admissibility, it focused on the substance of the claims (consisting of the damages claimed) rather than on the applicable law or the parties to each claim. This approach allows, first, to identify double recovery risks notwithstanding formal differences in the claims, and second, to grapple with such risks without necessarily deciding the ultimate merits of the claims.

Regardless of the jurisdictional position, considering admissibility or merits to maintain a strict separation of overlapping claims because the ‘parties are different’ is less justified.<sup>178</sup> The emphasis on the ‘substance of the claim’ was adopted in what was, after all, a diplomatic protection case, albeit involving the application of an FCN treaty.<sup>179</sup> Since diplomatic protection is subject to the exhaustion of local remedies rule and to standing requirements probably more stringent than those applicable in the BIT context, issues such as double recovery and inconsistent results<sup>180</sup> are more likely in investment arbitration.<sup>181</sup> One may add the current network of about 3,300 IIAs<sup>182</sup> and over 100,000 multinational enterprises controlling at least one million foreign affiliates.<sup>183</sup> This,

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<sup>175</sup> *Reparation for Injuries*, 185; *Barcelona Traction* (Second Phase) [53].

<sup>176</sup> See Resolution IDI (2003), 1; Orrego Vicuña (2005) 206; Chapter 1.

<sup>177</sup> Hobér (2005) 243.

<sup>178</sup> Salles (2014) 247.

<sup>179</sup> According to the US, the applicable FCN treaty aimed at ‘the protection of the parties’ respective nationals’. *Memorial of the United States*, 104. See also *Reply of the United States*, 392.

<sup>180</sup> Suárez Anzorena (2006) 41.

<sup>181</sup> Cf Juratowitch (2011) 320. Yet even in the diplomatic protection context, early on Jiménez de Aréchaga warned about the dangers of adopting a criterion on shareholder standing different from the one finally adopted by the ICJ in *Barcelona Traction*. Jiménez de Aréchaga (1965) 96.

<sup>182</sup> UNCTAD (2016) 101.

<sup>183</sup> Sauvart (2016) 13.

coupled with investment tribunals' view that any entity in a corporate structure—provided it is protected by an IIA—may claim for damages suffered by the local company,<sup>184</sup> also increases the possibilities of overlapping claims. Thus, for admissibility purposes, acknowledging overlaps between claims by different entities, adopting a substantive rather than formalistic approach as in *ELSI*, is at least as justified in international investment law.

#### 4 *The role of general international law and national law*

The rights of the local company and those of its foreign shareholders are potentially subject to national and international law. A relevant question here is what the law applicable to the interrelation between those rights is. In its 2010 judgment in *Diallo* the ICJ observed that 'international law has repeatedly acknowledged the principle of domestic law that a company has a legal personality distinct from that of its shareholders'.<sup>185</sup> This has important consequences, including that 'the rights and assets of a company must be distinguished from the rights and assets of an *associé*' and 'that the liabilities of the company are not the liabilities of the shareholder'.<sup>186</sup> In particular, 'debts receivable from third parties' also belong to the company and are not owned by the shareholders or *associés*.<sup>187</sup> The Court had already affirmed these principles in its 2007 judgment on preliminary objections.<sup>188</sup>

As in *Barcelona Traction*, the Court in *Diallo* considered the separate personality of companies as a principle recognized by international law.<sup>189</sup> The distinction between the rights, assets, and liabilities of the company and those of the shareholders was also acknowledged.<sup>190</sup> The Court observed, nonetheless, that '[i]n determining whether a company possesses independent and distinct legal personality, international law looks to

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<sup>184</sup> Schreuer (2005) 20.

<sup>185</sup> *Diallo* (Merits), 689.

<sup>186</sup> Ibid. Judge Greenwood observed that '[a]t the heart of the Barcelona Traction principle is the elementary proposition that the rights, assets and liabilities of a limited company are separate and distinct from those of its shareholders'. *Diallo* (Compensation), 391 (Dec, Greenwood).

<sup>187</sup> *Diallo* (Merits), 690.

<sup>188</sup> *Diallo* (Jurisdiction), 605.

<sup>189</sup> In *Diallo*, although Guinea was pursuing diplomatic protection on behalf of Mr Diallo as the 'majority shareholder' in the Congolese companies, it also acknowledged the separate personality of the company and its shareholders. *Guinea's Memorial*, 80.

<sup>190</sup> After citing *Barcelona Traction*, in *Diallo* the Court referred to the rule that the 'shareholder has no right to the corporate assets' as 'the fundamental rule in this respect'. *Diallo* (Jurisdiction), 606.



the rules of the relevant domestic law'.<sup>191</sup> To 'establish the precise legal nature' of the legal entities it is necessary to refer to national law.<sup>192</sup> The rights of both the shareholders and the company are determined by the law of the company's national state.<sup>193</sup> Thus, the Court in *Diallo* upheld *Barcelona Traction*'s reliance on domestic rules.<sup>194</sup> Instead of the reference in *Barcelona Traction* to 'rules generally accepted by municipal legal systems',<sup>195</sup> however, the ICJ identified the state of nationality of the company as the applicable national law.<sup>196</sup> This law must be applied to 'define the precise nature, content and limits' of the rights of the shareholders or *associés* of the company, and of the latter's organs.<sup>197</sup> The definition of such rights was made at the merits stage,<sup>198</sup> through a detailed analysis of the relevant provisions of Congolese law.<sup>199</sup>

The Court's discussion in *Diallo* of Congolese law to distinguish between the rights of the company and those of its members is preferable to *Barcelona Traction*'s reference to generally accepted municipal rules. Still, national law rules related to the company's independent legal personality should not be transposed to international law 'lock, stock and barrel'.<sup>200</sup> *A fortiori* in considering legal grounds that could affect investment claims' admissibility, such rules should 'serve as indications of principle and not as rigid injunctions in the international domain'.<sup>201</sup> Müller criticized the ICJ's reliance in *Diallo* on the company's independent legal personality as recognized by the relevant national law.<sup>202</sup> He argued that the reference to national law does not elevate companies'

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<sup>191</sup> Ibid, 605.

<sup>192</sup> Ibid.

<sup>193</sup> Ibid, 606. See also ILC 2006 Report, 42.

<sup>194</sup> This, despite the criticisms against the references to national law in *Barcelona Traction*. See Lillich (1971) 524.

<sup>195</sup> *Barcelona Traction* (Second Phase) [50].

<sup>196</sup> *Diallo* (Jurisdiction), 605. The contrast with *Barcelona Traction*'s assertion that in this field international law does not refer 'to the municipal law of a particular State' is clear. *Barcelona Traction* (Second Phase), para 50.

<sup>197</sup> *Diallo* (Jurisdiction), 606.

<sup>198</sup> Ibid.

<sup>199</sup> *Diallo* (Merits), 674-687. Müller (2015) 246.

<sup>200</sup> *Barcelona Traction* (Second Phase), 66 (Sep Op, Fitzmaurice) (quoting McNair's separate opinion in the *South West Africa* 1950 advisory opinion).

<sup>201</sup> Ibid.

<sup>202</sup> See *Diallo* (Jurisdiction) [61]; Müller (2015) 58-59.

domestic legal regime and all their rights and obligations to the international plane.<sup>203</sup> Such reference is intended to establish the existence of the national law rights protected by international law and the identity of the rights' owner.<sup>204</sup> Yet, the scope of the independent corporate personality is determined by international law and its reference to national law.<sup>205</sup> Here, Müller's position appears circular, in that he admits international law's reliance on national law as to the company's autonomous existence.<sup>206</sup>

Is the position different in international investment law? When an IIA is applicable, is recourse to municipal law principles to determine 'the nature and interrelation' of the rights of the company and its shareholders excluded? To the extent that IIAs establish their own rules on shareholder rights, it could be argued that recourse to national law is not necessary. The *Teinver* tribunal asserted that 'there is no reason to resort to municipal law when the treaty instrument provides the source of the rights asserted'.<sup>207</sup> Müller argued that, while being close to property rights established by national law, the notion of investment is autonomous.<sup>208</sup> IIAs may, according to their own criteria, grant independent rights over the same asset to persons other than its owner, not least shareholder rights over the company's assets.<sup>209</sup>

On the contrary, this thesis argues that IIAs can hardly be described as 'a self-contained closed legal system' isolated from 'certain supplementary rules, whether of international law character or of domestic law nature'.<sup>210</sup> Accordingly, national law is frequently a necessary complement to IIAs, whose provisions on shareholder matters generally do not go much further than including shares as protected investments. In the absence of detailed regulation in IIAs on the relationship between shareholder and

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<sup>203</sup> Müller (2015) 2, 57-58.

<sup>204</sup> Ibid, 58.

<sup>205</sup> Ibid, 59.

<sup>206</sup> Ibid.

<sup>207</sup> *Teinver* (Jurisdiction) [219].

<sup>208</sup> Müller (2015) 381. Müller also argues, however, that the notion of investment in IIAs is nothing more than a more or less identified bundle of property rights. Ibid, 356.

<sup>209</sup> Ibid, 381, 406, 415.

<sup>210</sup> *AAPL* [21]. See also Douglas (2009) 9.

company rights, ‘a tribunal should in principle be guided by the more detailed prescriptions of the applicable municipal law’.<sup>211</sup>

The ICJ’s approach to applicable law in *Diallo* has been criticized. If national law determines shareholder rights in general international law, the upshot is ‘a permanent and universal Calvo clause for shareholders’, leaving the standard of shareholder protection ‘to the whim of those responsible for deciding the content of domestic law’.<sup>212</sup> But applying national law in conjunction with the IIA provisions in determining the scope of shareholder rights, including vis-à-vis the company’s rights, does not mean that the application of international law is excluded. Neither *Barcelona Traction* nor *Diallo* suggest that the position of shareholders in national law is definitive before an international tribunal. All relevant rules of international law will also be applicable, notwithstanding their frequent lack of specificity in the field of protection of foreign property. And in case of conflict, including cases in which national law has been modified in a manner contrary to international law, international law prevails.

The application of general international law in investment arbitration is uncontroversial, but has received surprisingly little attention until recently.<sup>213</sup> For present purposes, most tribunals overlook the customary international law rule of the company’s independent legal personality vis-à-vis its shareholders. The same applies to international law’s reliance on national law to ‘define the precise nature, content and limits’ of shareholders’ rights.<sup>214</sup> There is no apparent justification for the failure to recognize these notions in international investment law. The ICJ in *Diallo* conducted a detailed analysis of the interrelation between company and shareholder rights. It applied international and national law principles when it dealt with the substance of the claims, rather than at the jurisdictional phase. This makes the alleged dichotomy between the diplomatic protection and non-diplomatic protection contexts less relevant. Investment tribunals dealing with shareholder claims must also determine what rights shareholders hold, albeit in light of the provisions of the applicable IIA. *A fortiori* when the claim relates to losses inflicted on the company’s assets, the omission to consider relevant international and national law principles for admissibility and merits purposes is not justified in terms of the applicable

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<sup>211</sup> *Perenco* (Jurisdiction and Liability) [522]. See also Schreuer and Reinisch (2002) [93].

<sup>212</sup> Juratowitch (2011) 313.

<sup>213</sup> *Accession Mezzanine* (Rule 41(5)) [68]; Parlett (2016) 434.

<sup>214</sup> But see *Perenco* (Jurisdiction and Liability) [519].

law. It may also ‘invite serious legal difficulties’,<sup>215</sup> including double recovery risks, and impact the rights and legitimate interests of third parties.

## II SHAREHOLDER STANDING BEFORE INVESTMENT TRIBUNALS

Discussion of shareholder rights in international investment law, as was the case in *ELSI*,<sup>216</sup> has essentially revolved around the scope of treaty provisions. In *Diallo*, the ICJ noted the current central role of IIAs in the recognition of shareholders’ and companies’ rights in international law and in the resolution of related disputes.<sup>217</sup> This section discusses investment tribunals’ views on the relevance of national and general international law principles on corporate and shareholder rights given the applicability of IIAs. It also considers to what extent there is a substantive overlap between shareholder treaty rights and companies’ (mostly national law) rights. This overlap refers to coexisting rights of shareholders and companies over the same assets and is intimately related to the idea of substantively overlapping claims, i.e., claims deriving from the same host state measures and involving the same damages.

### A Development of the prevailing concepts

Investment arbitration has witnessed the consolidation of the idea that shareholders are entitled to bring claims under IIAs for measures affecting the company in which they hold shares. This idea was already present in some investment tribunals’ decisions preceding the cases brought against Argentina since 2001.<sup>218</sup> Yet before the 2003 jurisdictional decision in *CMS*, investment tribunals did not completely marginalize national law principles related to shareholder and company rights. Further, despite recognizing shareholders’ *jus standi*, pre-*CMS* decisions often acknowledged a close relationship between shareholder IIA claims and the local company’s claims. The position on the role of national law in shareholder treaty claims and on the relationship between these claims and the company’s claims, however, changed fundamentally after *CMS*.<sup>219</sup>

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<sup>215</sup> *Barcelona Traction* (Second Phase), 33.

<sup>216</sup> Murphy (1991) 447.

<sup>217</sup> *Ibid*, 614.

<sup>218</sup> The present author was involved as counsel in the investment arbitrations commenced against Argentina since 2001.

<sup>219</sup> Gaukrodger (2014) 37.

The decision on jurisdiction in *CMS* found that the company's independent legal personality and other related national law concepts are irrelevant in treaty claims, at least at the jurisdictional phase, and that they may interfere with IIAs' ultimate aim of protecting the real interests behind the company. Further, given shareholders' 'independent right of action' under IIAs, whether the shareholder claimant is a party to the contract and other similar contractual/national law considerations are also irrelevant. The problem is that these notions, whatever their merits for jurisdictional purposes, have coloured how tribunals evaluate the substance of the claims. However, the concept of 'independent right of action' risks concealing the substantive links between related claims. These links potentially affect investment claims' admissibility to the extent they involve risks of double recovery or prejudice to third-party interests.

#### 1 *The position before the Argentine cases*

Before the cases brought against Argentina beginning in 2001, there were few decisions of modern investment tribunals discussing shareholder standing. Moreover, to the extent a couple of decisions referred to the legal basis of shareholder indirect claims, the analysis was limited. There are several reasons for this. First, publicly available decisions by investment tribunals were not numerous even up to the mid-2000s. Second, some of the early cases potentially involving the issue included both claims referring to shareholders' indirect interests in the company's assets and to shareholders' direct rights.<sup>220</sup> To a certain extent, this made it unnecessary to deal expressly with shareholder standing. Third, the boom in the number of shareholder indirect claims—i.e., claims relating exclusively or primarily to injury to the company's assets—is directly related to the inclusion of shares as protected investments and related provisions in IIAs. In turn, the entry into force of a high number of IIAs is a relatively recent phenomenon.<sup>221</sup>

One of the first modern investment cases to deal with a shareholder indirect claim was *AAPL*. The claim referred to the destruction, by the security forces of Sri Lanka, of a farm owned by a local company in which the claimant, a Hong Kong corporation, held equity capital.<sup>222</sup> Sri Lanka did not challenge the claimant's standing to claim

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<sup>220</sup> See *AGIP* [97]; *Lanco* [12]. These two cases involved the claimant shareholder's direct rights not in the sense of *Barcelona Traction's* general distinction between the company's and the shareholders' rights. Rather, the claimant's direct rights were involved in that, aside from being a shareholder in the local company, it was also a party to the relevant agreements.

<sup>221</sup> Hobe (2015) 14.

<sup>222</sup> *AAPL* [1, 3].

compensation ‘for its proportionate ownership’.<sup>223</sup> While the tribunal clearly concluded that the claimant’s shares were a protected investment under the applicable BIT, this provided ‘no direct coverage’ as regards any of the company’s assets.<sup>224</sup> Protection under international law referred only to the value of the shares owned by the foreign investor.<sup>225</sup> For damages purposes, however, all of the company’s assets had to be considered to establish the market price of the investor’s shares.<sup>226</sup> In essence, therefore, the shareholder’s compensation was directly based on the harm to the company’s assets, after deducting the latter’s debts.<sup>227</sup>

During the 1990s, a few other decisions by investment tribunals affirmed jurisdiction over shareholder indirect claims, essentially invoking shares’ and companies’ protected status as investments under the relevant treaties.<sup>228</sup> This allowed the tribunal in *Goetz* to observe, at the end of the decade, that

the preceding jurisprudence of ICSID does not grant standing only to the sole legal persons directly affected by the contested measures but it extends it also to the shareholders of these persons, who are the real investors.<sup>229</sup>

The *Goetz* tribunal concluded, however, that to respect its international obligations Burundi had to either pay compensation to the local company, the addressee of the state’s measures,<sup>230</sup> or reinstate the company’s rights affected by such measures.<sup>231</sup> Burundi had four months to comply. Otherwise, the tribunal would fix a compensation payable to the claimants,<sup>232</sup> who held 999 of the 1000 shares of the company.<sup>233</sup>

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<sup>223</sup> Ibid [32 (E)].

<sup>224</sup> Ibid [95].

<sup>225</sup> Ibid.

<sup>226</sup> Ibid [96-98].

<sup>227</sup> Ibid [97-98]. In the case, given that the claimant had considered its investment a total loss and offered to ‘give up its shares’ upon payment of adequate compensation, the tribunal invited the parties to agree to the transfer of the shares by the claimant to Sri Lanka, ‘free of charge’, after payment of the compensation established in the award. Ibid [10, 116].

<sup>228</sup> See *AMT* [5.15]; *Maffezini* (Jurisdiction) [68-70].

<sup>229</sup> *Goetz* [89].

<sup>230</sup> Ibid [1-17].

<sup>231</sup> Ibid [137].

<sup>232</sup> Ibid.

<sup>233</sup> Ibid [18].

Irrespective of whether the *Goetz* tribunal's reading of ICSID precedents was correct, the decision clearly supports investment tribunals' jurisdiction over shareholder indirect claims. Yet, despite being a case brought under an IIA,<sup>234</sup> the tribunal recognized, first, that the 'internationalization of investment relationships' provoked by IIAs did not 'lead to a radical "denationalization" of the legal relationships arising from the foreign investment, to the point that the national law of the host state would be deprived of any pertinence or application giving way to an exclusive role to international law'.<sup>235</sup> Second, the decision's conclusions on compensation entail that in the tribunal's view the shareholders' and the company's claims substantively overlapped—i.e., referred to the same damages—to the extent that compensating the company would extinguish the shareholders' treaty claims. In fact, in execution of the arbitral tribunal's decision, a settlement agreement was concluded between the company—not its shareholders—and Burundi.<sup>236</sup>

## 2 *The corporate entity in the jurisdictional decision in CMS*

The first jurisdictional decision rendered in the cases arising from Argentina's 2001 collapse is also the most influential as regards shareholder standing.<sup>237</sup> CMS Gas Transmission Company (CMS) was a minority shareholder in an Argentine natural gas transportation licensee (TGN).<sup>238</sup> The dispute referred to alleged breaches of the Argentina-US BIT as a result of measures taken by Argentina in respect of the licensee's tariffs.<sup>239</sup> The measures related to the serious crisis affecting the country reaching its apex in late 2001 and early 2002, which led to the adoption of changes in the country's macroeconomic policies.<sup>240</sup> As an admissibility objection, Argentina advanced that CMS did not 'hold the rights upon which it base[d] its claim – to wit, TGN being the licensee, and CMS only a minority shareholder in this company, only TGN could claim for any

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<sup>234</sup> Ibid.

<sup>235</sup> Ibid [69]. Author's translation (original French).

<sup>236</sup> Ibid [518-520].

<sup>237</sup> Given that subsequent jurisdictional decisions in cases against Argentina followed closely the reasoning in *CMS* on shareholder standing, they will not be discussed in detail except insofar as they raise new relevant points.

<sup>238</sup> *CMS* (Jurisdiction) [19].

<sup>239</sup> Ibid [118].

<sup>240</sup> Ibid [23].

damage suffered'.<sup>241</sup> Argentina further argued that the licensee did 'not qualify as a foreign investor under the BIT nor [was] the License a foreign investment' and that CMS was claiming for indirect damages resulting from its minority shareholding in the local company and not for direct damages.<sup>242</sup>

One of the main issues the tribunal identified for decision was 'whether a shareholder can claim for its rights in a foreign company independently from the latter's rights and, if so, whether these rights refer only to its status as shareholder or also to substantive rights connected with the legal and economic performance of its investment'.<sup>243</sup> Argentina had invoked the rule under Argentine law—shared with many other legal systems—that 'the corporate legal personality is distinct and separate from that of the shareholders'.<sup>244</sup> The tribunal observed that, regardless of its merits, the distinction was not dispositive in the case, essentially because national law was not relevant for jurisdictional purposes.<sup>245</sup> As to general international law, the tribunal considered the ICJ's treatment of shareholder rights in *Barcelona Traction* as pertaining only to the specific context of diplomatic protection and thus not germane.<sup>246</sup> In *Barcelona Traction*, moreover, the ICJ had viewed the legal relationships in question as linked to national law.<sup>247</sup> The CMS tribunal's conclusion was that it found 'no bar in current international law to the concept of allowing claims by shareholders independently from those of the corporation concerned'.<sup>248</sup>

With respect to the ICSID Convention, the tribunal noted the lack of a definition of the term investment, but recalled that shares were one of the examples of investment specifically mentioned in the drafting history.<sup>249</sup> Under the Convention, moreover, the

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<sup>241</sup> Ibid [36]. The tribunal observed, however, that '[t]he distinction between admissibility and jurisdiction does not appear quite appropriate in the context of ICSID as the Convention deals only with jurisdiction and competence'. Ibid [41].

<sup>242</sup> Ibid [36].

<sup>243</sup> Ibid.

<sup>244</sup> Ibid [42].

<sup>245</sup> Ibid.

<sup>246</sup> Ibid [43-45].

<sup>247</sup> Ibid [43].

<sup>248</sup> Ibid [48]. The tribunal reached similar conclusions under the ICSID Convention and the Argentina-US BIT. Ibid [49-65].

<sup>249</sup> Ibid [50].



concept of investment is not restricted to controlling or majority shareholdings.<sup>250</sup> Article 25(2)(b) *in fine*'s reference to 'foreign control' is meant to 'facilitate agreement between the parties, so as not to have the corporate personality interfering with the protection of the real interests associated with the investment'.<sup>251</sup> However, the same outcome may be realized through BIT provisions including non-controlling or minority shareholders within the scope of the consent to arbitral jurisdiction.<sup>252</sup> Further, '[w]hether the protected investor is in addition a party to a concession agreement or a license agreement with the host State is immaterial for the purpose of finding jurisdiction under those treaty provisions, since there is a direct right of action of shareholders'.<sup>253</sup>

Argentina, however, did not seem to dispute shareholders' 'independent right of action'.<sup>254</sup> Rather, in the tribunal's words, Argentina 'asserted that an investment in shares is indeed a protected investment under the Treaty, but this would only allow claims for measures affecting the shares as such' and not for claims referring to losses suffered by the company.<sup>255</sup> The tribunal did not discuss this specific issue in the decision on jurisdiction. Perhaps more problematic, it did not address it in its award either. In the end, the *CMS* tribunal found that national law was largely irrelevant as regards jurisdiction and saw the company's corporate personality as potentially 'interfering with the protection of the real interests associated with the investment'.<sup>256</sup> It also regarded as immaterial whether the claimant in an investment treaty claim is a party to the contract to which the claim relates.<sup>257</sup>

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<sup>250</sup> Ibid [51].

<sup>251</sup> Ibid.

<sup>252</sup> Ibid. The *CMS* tribunal did not consider it relevant to jurisdiction whether the claimant was a minority or majority shareholder. Ibid [48]. Depending on the provisions of the applicable treaty, it may well be that this aspect is irrelevant for jurisdiction. However, whether the claimant controls the local company may be relevant for admissibility or merits purposes.

<sup>253</sup> Ibid [65].

<sup>254</sup> Ibid [59]. But see ibid [37] ("Argentina has also advanced the view that, in addition, CMS cannot claim for its proportional share in TGN, as this would imply that the shareholders have a standing different from that of the company."). This appears to relate, however, to whether shareholders can claim directly for their proportional share of the company's damages, rather than for injuries to their rights. See ibid [36].

<sup>255</sup> Ibid [59].

<sup>256</sup> See *Diallo* (Merits), 702 (Diss Op Al-Khasawneh and Yusuf) ('[D]evelopments in the field of foreign investments have led to the wholesale abandonment of the distinction between the corporate personality of the company on the one hand and that of the shareholders on the other').

<sup>257</sup> While largely following *CMS* on jurisdiction over shareholder indirect claims, the *LG&E* tribunal stated that the absence of a contract between the claimant and Argentina favoured the application of international law, albeit 'complemented by the domestic law'. *LG&E* (Jurisdiction) [98].

Yet it is increasingly accepted that national law is relevant in investment treaty arbitration even for certain jurisdictional matters.<sup>258</sup> Specifically in the field of shareholder standing, it has been argued that the provisions of the relevant national law on shareholder rights should not be treated as a fact and should be applied together with international law.<sup>259</sup> The principles of corporate personality and its legal corollaries,<sup>260</sup> as well as that of privity of contract, are generally recognized both by national and general international law. The *CMS* tribunal may have been right in asserting that these notions do not affect an international tribunal's jurisdiction granted by an IIA. But a similar conclusion is not justified with respect to decisions on the admissibility or merits of shareholder treaty claims.<sup>261</sup> Such principles may be relevant in determining to what extent shareholder claims relating to a contract concluded by the company are, in substantive terms, compatible with the company's rights and those of third parties. And if so, whether in any event respect for such rights requires, in the circumstances of the case, that limits to the admissibility of the shareholder claim be acknowledged.

### 3 *The object of shareholders' claims*

Investment tribunals have accepted shareholder standing mainly based on the wide definition of the term investment in IIAs. Shares—and often the companies themselves—are generally expressly included within the definition, which means that shareholders hold a protected investment. The effect of this is that shareholders hold rights that may be asserted independently from the company's rights and 'a separate cause of action under the Treaty in connection with the protected investment'.<sup>262</sup> The shareholder's separate cause of action concept is often linked, in *CMS*<sup>263</sup> and in the decisions that followed it such as *LG&E*,<sup>264</sup> to the distinction between contract and treaty claims. Since

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<sup>258</sup> Schreuer (2014) 4.

<sup>259</sup> Waibel (2014) 513.

<sup>260</sup> Diez de Velasco observed that under general international law 'shareholders do not have property rights over the assets of the company, which is the consequence of the company's independent personality and the limitation of responsibility enjoyed by shareholders'. Diez de Velasco (1974) 148. Author's translation (original French). In the award, the *CMS* tribunal acknowledged shareholders' 'limited liability'. *CMS* (Award) [426].

<sup>261</sup> On the relevance of privity of contract in treaty claims see *Poštová Banka* [230]. See, however, Ho Qing Ying (2014) 97; *Parkerings* [259].

<sup>262</sup> *CMS* (Jurisdiction) [68].

<sup>263</sup> *Ibid* [64-65].

<sup>264</sup> *LG&E* (Jurisdiction) [61].

shareholders have a protected investment under IIAs, they have *jus standi* to invoke a treaty cause of action notwithstanding other causes of action that may exist under contracts or other (generally national law) instruments.<sup>265</sup>

Differences have emerged, however, wherever the decisions have provided reasons beyond the general concept that investors protected by a treaty may have a treaty cause of action: in particular, as to the legal basis of shareholder rights over the company's assets. In *Azurix*, the claimant had incorporated and indirectly owned 90% of the shareholding of a local company, which was party to a concession contract for the provision of water and wastewater services in Argentina.<sup>266</sup> The tribunal observed that shares, companies, and rights under contracts qualified as investments under the Argentina-US BIT.<sup>267</sup> Accordingly, '[p]rovided the direct or indirect ownership or control is established, rights under a contract held by a local company constitute an investment protected by the BIT'.<sup>268</sup> Thus, a shareholder who has demonstrated control can invoke the company's contractual rights as its own investment.<sup>269</sup>

Similarly, also applying the Argentina-US BIT, the tribunal in *Continental* stated that in the case of an acquisition of the entire capital of a company 'the treaty protection is not limited to the free enjoyment of the shares' and extends 'to the operation of the local company that represents the investment'.<sup>270</sup> Other investment tribunals have also concluded that the protection BITs grant to shareholders extends to the investments' 'substance', i.e., the assets owned by the company, but without requiring that the latter be controlled, let alone wholly-owned, by the foreign shareholder.<sup>271</sup> Regardless of whether control is required, these cases stand for the proposition that a shareholder may invoke the local company's rights, provided it does so in the context of a treaty claim.

The tribunal in *El Paso*, again under the Argentina-US BIT, took a different view. But this view was spelled out only in the award. In the jurisdictional decision, in order to reject Argentina's objection that the claimant as an indirect minority shareholder had no

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<sup>265</sup> Ibid [60-63]; Cremades and Cairns (2005) 22.

<sup>266</sup> *Azurix* (Jurisdiction) [64-65].

<sup>267</sup> Ibid [63].

<sup>268</sup> Ibid.

<sup>269</sup> Alexandrov argues that here the *Azurix* tribunal 'followed the inevitable logic'. Alexandrov (2005) 44.

<sup>270</sup> *Continental* (Jurisdiction) [79].

<sup>271</sup> *Total* (Jurisdiction) [74].

*jus standi*,<sup>272</sup> the tribunal simply quoted the *LG&E* tribunal's opinion that shares in local companies were a protected investment under the Argentina-US BIT, regardless of whether it was a majority or minority shareholding.<sup>273</sup> In the award, however, the tribunal stated that the contention that the BIT's broad definition of investment encompassed both the claimant's shareholdings and the rights of the local companies<sup>274</sup>

appear[ed] contradictory: either the domestic companies enjoy an independent legal existence, in which case it is they who own said legal and contractual rights, this meaning that the foreign investors' losses can be measured only by the diminished value of their shares in the companies. Or the domestic companies' legal existence is but a fiction, at least on the international level, and can therefore be disregarded, which would mean that the investment can practically be characterised as a direct one, the consequence being that the foreign investor may claim, as the owner of the local companies, the legal and contractual rights in question, but not its losses as a shareholder.<sup>275</sup>

The tribunal saw these two views as 'irreconcilable' and involving claiming twice for the same damage.<sup>276</sup> The local companies were not protected investors and thus their rights could not be considered protected investments.<sup>277</sup> Further, the claimant's investment was limited to its shares in the local companies.<sup>278</sup>

The decisions considered above differ with respect to investment tribunals' approaches to important aspects of shareholder standing. The differences include the extent to which (and if so in what circumstances) the company's contractual rights may be considered an investment of its shareholders under IIAs. These divergences cannot be explained away by referring to the text of the different treaties. For example, the Argentina-US BIT includes investments 'owned or controlled directly or indirectly' by protected investors.<sup>279</sup> Still, in applying the treaty, the tribunals in *Azurix*, *Continental*, and *El Paso* arrived at different conclusions on whether the shareholder claimant could claim for harm to the company's assets. When rights under a contract concluded by the local company are considered as investments over which foreign shareholders have

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<sup>272</sup> *El Paso* (Jurisdiction) [137-139].

<sup>273</sup> *Ibid* [138].

<sup>274</sup> *El Paso* (Award) [173-174].

<sup>275</sup> *Ibid* [174].

<sup>276</sup> *Ibid* [175].

<sup>277</sup> *Ibid* [188].

<sup>278</sup> *Ibid* [214]. See also *ST-AD* [282].

<sup>279</sup> Argentina-US BIT, Art I.1 a).

(directly or indirectly) rights or interests, the overlap between the company's contract rights and shareholders' treaty rights is undeniable. Aside from jurisdictional and applicable law implications, the underlying contract rights that may be claimed both by the company and its shareholders (typically before national and international fora, respectively) are the same.

The fact that both the company in national law claims and shareholders in treaty claims can claim for the same assets is not necessarily contradictory. Arguably, the protection in IIAs of shareholders' indirect interests in assets has precisely that effect.<sup>280</sup> Yet the possibility of multiple recovery for the same damage is clear. Preventing the shareholder from claiming both for harm to the company's assets and for the diminution in the value of the shares resulting from the same measures, as asserted by the *El Paso* decision, prevents instances of double recovery within the same proceeding. But, at the same time, the approach in *El Paso* entails acknowledging that shareholder claims for reduction in the share value may involve the same damage as a claim for the local company's rights. No criterion was offered as to how to reconcile such shareholder claims with the company's claims for its rights.

#### B The merits of the claims

The distinction between shareholder treaty rights and the company's rights has been articulated in jurisdictional terms by investment tribunals, without a discussion of the merits. Yet when the substance of the claims is considered, the overlap between the two sets of rights becomes apparent (although even merits decisions generally bypass it). IIAs may have created new holders of protected interests and additional causes of action available to shareholders, but the underlying assets remain those of the local company. They are owned by a person different from the shareholder.

In the case of contracts, the lack of privity should not be neglected for purposes of treaty claims' admissibility. However, if in the circumstances of the case such lack is not deemed as an absolute bar to admissibility, the equilibrium between contractual rights and obligations should then be considered. For example, is it admissible for the shareholder to recover the full value of contract rights when some or all of the local company's contractual obligations remain outstanding (and will perhaps never be fulfilled)? Or should shareholder recovery be, where appropriate, limited to account for

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<sup>280</sup> Bentolila (2010) 135; *Azurix* (Annulment) [107-108]; *RREEF* (Jurisdiction) [142].

how the local company has complied (or failed to comply) with its obligations under the contract? The answer to the last question should be in the affirmative. Privity of contract cannot be ignored in allowing shareholder treaty claims and at the same time work as a shield for the shareholder in respect of contractual obligations. If the shareholder is, in substance, enforcing contractual rights (through treaty claims), it must be held accountable for contractual obligations, at least in terms of limiting recovery where appropriate.

#### 1 *Distinguishing between shareholder and company rights*

Several arbitral decisions have stressed the notion that shareholder claims involve rights different from the company's rights. This and similar ideas are related to the contract claims/treaty claims distinction. They frequently also appear connected to the distinction between national and international law. In the *Telefónica* case, which involved the Argentina-Spain BIT, the tribunal noted that since

the assets and rights that Telefónica claim[ed had] been injured in breach of the BIT [fell] under the definition of investments under the BIT, it [was] immaterial that title to some of them [was] in [the local company] in accordance with the law of Argentina. Telefónica assert[ed] its own treaty rights for their protection, regardless of any right, contractual or non-contractual, that [the local company] might assert in respect of such assets and rights under local law.<sup>281</sup>

In the jurisdictional decision, the tribunal in *Urbaser* (involving the same BIT) stressed that what was crucial was that the claimants were exercising their own treaty rights as investors in shares of a local company, which were 'different from any rights attached to their shares under domestic law'.<sup>282</sup>

While the decisions in *Telefónica* and *Urbaser* were rendered in the jurisdictional phase, the issue of distinguishing between the company's and the shareholders' rights came up again in *CMS* in the merits award. In the case, it was not CMS as a shareholder but the local company who held the licence that (together with other national law provisions) had been affected by the contested measures.<sup>283</sup> In the award, the tribunal noted that Argentina had 'again raised certain jurisdictional issues that [had been] addressed in the jurisdictional phase of the case, such as the *jus standi* of the Claimant',

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<sup>281</sup> *Telefónica* [89]. See also *Total* (Jurisdiction) [80].

<sup>282</sup> *Urbaser* (Jurisdiction) [251].

<sup>283</sup> *CMS* (Jurisdiction) [19, 118].

which would not be reopened.<sup>284</sup> Argentina had argued that the provisions of the national regulatory framework invoked in the claim granted rights to the local company but not to the foreign shareholder.<sup>285</sup>

In the decision on jurisdiction, however, while the tribunal had clearly affirmed CMS's right to claim independently from the company,<sup>286</sup> it had not specified which rights CMS could claim for. After defining the applicable law and confirming the scope of the tribunal's jurisdiction,<sup>287</sup> the award posed and answered the following questions: 'Did the Claimant have a Right to a Tariff Calculated in US Dollars?', 'Did the Claimant have a Right to Adjustment of Tariffs in Accordance with the US PPI?', and 'Did the Claimant have a Right to Stabilization Mechanisms under the License?'.<sup>288</sup> None of these rights were provided for in the applicable treaty but, if anything, in specific provisions of the local company's license and the applicable regulatory framework.<sup>289</sup> Nonetheless, because such rights were 'no longer present in the regime governing the business operations of the Claimant', the tribunal found a breach of the fair and equitable treatment standard.<sup>290</sup>

CMS had also brought a claim under the Argentina-US BIT provision requiring each party to 'observe any obligation it may have entered into with regard to investments' (the 'umbrella clause').<sup>291</sup> Confronted with Argentina's argument that CMS derived no rights from the local company's license because it was not a party to it,<sup>292</sup> the tribunal again refused to discuss allegedly jurisdictional aspects that it had considered in the jurisdictional phase.<sup>293</sup> A violation of the umbrella clause was found 'to the extent that legal and contractual obligations pertinent to the investment have been breached and [had]

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<sup>284</sup> *CMS* (Award) [126].

<sup>285</sup> *Ibid* [148]. See also *ibid* [132].

<sup>286</sup> *CMS* (Jurisdiction) [48].

<sup>287</sup> *CMS* (Award) [115-126].

<sup>288</sup> *Ibid* [127-151].

<sup>289</sup> *Ibid*. See also *Charanne* [545] (stating that the *CMS* case involved the breach of contractual commitments).

<sup>290</sup> *CMS* (Award) [275-281].

<sup>291</sup> *Ibid* [296].

<sup>292</sup> *Ibid* [298].

<sup>293</sup> *Ibid* [299].

resulted in the violation of the standards of protection under the Treaty'.<sup>294</sup> This finding was annulled by an *ad hoc* committee for failure to state reasons.<sup>295</sup> The committee was troubled with the idea that '[a]lthough CMS was not entitled as a minority shareholder to invoke those obligations of Argentina under Argentine law (not being the obligee), the effect of [the umbrella clause] was to give it standing to invoke them under the BIT'.<sup>296</sup>

State obligations covered by umbrella clauses

will often be a bilateral obligation, or will be intrinsically linked to obligations of the investment company. Yet a shareholder, though apparently entitled to enforce the company's rights in its own interest, will not be bound by the company's obligations, e.g. as to dispute settlement.<sup>297</sup>

The committee could not understand, based on the award, how the tribunal had concluded that CMS could enforce obligations that Argentina owed to another party.<sup>298</sup>

In considering the merits of shareholder claims, other investment tribunals have drawn a clearer distinction between the company's rights and those of the shareholders. For example, the tribunals in the *Suez* cases, while simply noting in the jurisdictional decisions that under the applicable BITs shareholders had standing to protect their shares through an arbitration,<sup>299</sup> clarified in the merits phase that the local companies, as the concessionaires, owned the contractual rights under the concessions.<sup>300</sup> Shareholders only have 'an indirect interest in those same rights',<sup>301</sup> although their protected investment, the shares, would be directly affected by any harm to the company's assets.<sup>302</sup> Investment tribunals have also affirmed that 'shareholders do not have claims arising from or rights in the assets of the companies in which they hold shares'.<sup>303</sup>

In the decisions discussed above dealing with the merits of the claims, shareholders were treated either as directly holding (or being entitled to directly invoke)

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<sup>294</sup> Ibid [303].

<sup>295</sup> *CMS* (Annulment) [97].

<sup>296</sup> Ibid [92].

<sup>297</sup> Ibid [95 (d)].

<sup>298</sup> Ibid [96].

<sup>299</sup> *Suez I* (Jurisdiction) [51]; *Suez II* (Jurisdiction) [51].

<sup>300</sup> *Suez I* (Liability) [119, 137]; *Suez II* (Liability) [130, 148].

<sup>301</sup> See e.g. *Suez I* (Liability) [119].

<sup>302</sup> Ibid. See also *EDF* (Jurisdiction) [137] (under the applicable BIT the claimants, as indirect shareholders, 'possessed rights which carried an interest in the Concession owned by [the company]').

<sup>303</sup> *ST-AD* [278]; *Poštová Banka* [229].



certain contractual and other rights that under domestic law were owned by the local company, as in *CMS*, or as having an ‘indirect interest’ in these rights, as in *Suez*. In both cases, nonetheless, the holding of shares as a protected investment allowed shareholders to bring claims vis-à-vis measures affecting the company’s assets.<sup>304</sup> The distinction between rights and ‘an indirect interest in those same rights’ is reminiscent of a similar distinction drawn in *Barcelona Traction*.<sup>305</sup> Unlike the default position under general international law described in *Barcelona Traction* and *Diallo*, IIAs often expressly protect both the rights and interests of investors.<sup>306</sup> This would confer on shareholders a treaty cause of action in respect of assets over which, strictly speaking, they do not hold property rights.<sup>307</sup>

Yet even if conceptualized as treaty-protected interests (or rights),<sup>308</sup> such interests are held over the same assets that are owned by the local company under the applicable national law. Thus, both the company and IIA protected shareholders may have the right to claim in respect of the same injury to the company’s assets, albeit probably under different legal systems. Further, juridical persons appearing as claimants in investment arbitration are often part of a network of related companies.<sup>309</sup> Between a foreign shareholder and a subsidiary company incorporated in the investment’s host state, there may be any given number of intermediary legal entities. The point was noted by Jones, who observed that ‘shareholders are not infrequently corporations themselves, and

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<sup>304</sup> There is a third theory according to which ‘a shareholder of a company incorporated in the host State may assert claims based on measures taken against such company’s assets that impair the value of the claimant’s shares’. *Poštová Banka* [245]. See Chapter 5.

<sup>305</sup> *Barcelona Traction* (Second Phase), 44. Caflisch defined indirect interests as ‘the interests that may be held by the members or the creditors of a company in the assets and rights of the latter, which interests in principle do not have the character of acquired rights in domestic law’. Caflisch (1969) 20. Author’s translation (original French). The ICJ in *Barcelona Traction* left open the question of ‘the meaning of the term interests in the conventional rules’. See *Barcelona Traction* (Second Phase), 38.

<sup>306</sup> Juratowitch criticized the assumption in *Barcelona Traction* and *Diallo* ‘that there is a clear difference between a *right* and an *interest*’. Juratowitch (2011) 307. He observed that ‘[a]ll rights are interests’, although ‘[n]ot all interests are rights’. Ibid, 308. Yet, aside from the fact that the distinction between interests and rights had been recognized in international law before *Barcelona Traction* (see Jiménez de Aréchaga (1965) 72-74), his position is influenced by a view on the role of national laws on shareholder standing in international law which, as noted, is misguided.

<sup>307</sup> See Trans-Pacific Partnership (TPP), Annex 9-B(1) (referring to interferences with a ‘property right or property interest in an investment’).

<sup>308</sup> Tams argued that a state has standing in international law when it can show that its rights or legally protected interests ‘as opposed to mere interests’ have been affected. Tams (2005) 29. See also *South West Africa* [50]; Müller (2015) 233 (shareholders’ economic interests are transformed into rights whenever protected by international law provisions).

<sup>309</sup> Lowe (2010) 1017.

the process of identifying individual shareholders might be prolonged *ad infinitum*'.<sup>310</sup> Thus, indirect shareholdings in the local company affected by host state measures may be held by many entities.<sup>311</sup> While the high number of potential claimants may be regarded simply as a byproduct of IIAs' jurisdictional provisions, for admissibility purposes the fact that in substance the same claim is involved is a material fact.

## 2 *Obligations without privity?*

Investment tribunals have generally underscored that shareholder claims involve the latter's rights, not those of the company. Shareholder treaty claims involve not only different persons but also different causes of action than 'national' claims by the local company. Under this theory, any settlement or waiver by the local entity of such national claims does not directly affect shareholder treaty claims. The *El Paso* tribunal underscored the distinction between the shareholder as a protected investor under the BIT and the company where the shareholder had an interest, which was subject to the national regulatory framework.<sup>312</sup> On this basis, the tribunal concluded that the contention that the claimant had accepted the contested measures

by not objecting to the signing by [the local companies] of a number of agreements with the Government may not be shared. *El Paso* may not, in fact, be equated to the companies in which it was only a minority, non-controlling shareholder.<sup>313</sup>

The foreign shareholder was claiming under the BIT in its own right.<sup>314</sup> The local companies' dealings with the government did not in any way affect the claimant's treaty rights, whose alleged breach constituted the cause of action in the case.<sup>315</sup>

Other investment tribunals, however, have attributed effects to acts of the local company on the international claim. In the first jurisdictional decision, the *Saur* tribunal emphasized that the shareholder claimant was not a party to the relevant concession

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<sup>310</sup> Jones (1949) 235.

<sup>311</sup> Hobér (2014) 250.

<sup>312</sup> *El Paso* (Award) [549].

<sup>313</sup> Ibid.

<sup>314</sup> Ibid [550].

<sup>315</sup> Ibid [551]. The tribunal observed, however, that any benefits accruing to the shareholders under agreements between the local companies and the governments had to be considered when evaluating the damages. Ibid [550].

contract and could thus not exercise rights under it.<sup>316</sup> This had a concrete jurisdictional impact, in that the claimant was deemed not bound by the forum selection clause.<sup>317</sup> The tribunal asserted that the claimant was not advancing contract but treaty claims.<sup>318</sup> Since the claimant had concluded no contract with a public entity, the possibility of presenting a contract claim was *ab initio* excluded.<sup>319</sup>

In the merits decision, however, the *Saur* tribunal had to consider the effect of a renegotiation of the concession contract agreed to by the local company.<sup>320</sup> Invoking a provision of Argentine law, which was part of the applicable law,<sup>321</sup> the tribunal observed that under this provision settlement agreements had a *res judicata* effect binding on the parties.<sup>322</sup> But it then added that the *res judicata* effect extended also to the claimant who, as the controlling shareholder, could not regard measures that its own subsidiary had accepted as expropriatory.<sup>323</sup> The statement was not based on the Argentine law provision, which mentioned only the parties. Still, the claimant was ‘bound by the acts of its subsidiary’.<sup>324</sup> In fact, the tribunal rejected all the expropriation claims under the treaty that were based on measures covered by the renegotiation agreement.<sup>325</sup> However, other than suggesting that a settlement by the company prevents the controlling shareholder from reopening the settled claims,<sup>326</sup> the tribunal did not elaborate on the circumstances under which a settlement concluded by the local company may put an end to a BIT claim by one of its shareholders.<sup>327</sup>

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<sup>316</sup> *Saur* (Jurisdiction) [89].

<sup>317</sup> *Ibid.*

<sup>318</sup> *Ibid.*

<sup>319</sup> *Ibid* [112].

<sup>320</sup> *Saur* (Jurisdiction and Liability) [351].

<sup>321</sup> *Ibid* [326].

<sup>322</sup> *Ibid* [355-358].

<sup>323</sup> *Ibid* [358].

<sup>324</sup> *Ibid* [474].

<sup>325</sup> *Ibid* [361].

<sup>326</sup> *Ibid* [358].

<sup>327</sup> Although the tribunal stated that the claimant controlled the local company, this company was far from being a wholly-owned subsidiary. See *ibid* [333, 358].

Whenever a contract is involved, privity of contract needs to be considered, even in a treaty claim.<sup>328</sup> Contracts are based on the idea that parties have liberty to decide how to regulate their relations,<sup>329</sup> which includes selecting with whom to contract, the applicable law, the scope of the obligations, and so on. This does not mean that privity of contract should affect investment tribunals' jurisdiction over treaty claims, in which the claimant invokes its own treaty rights.<sup>330</sup> But when an IIA claim is premised substantively on breaches of a contractual framework, both parties to the investment arbitration should be able to invoke the contractual obligations against each other, even if such parties are not the same as the parties to the contract.<sup>331</sup> Otherwise, if privity of contract is disregarded only in favour of investors but not in favour of the respondent state, the balance achieved in the contract underlying the treaty claim is disrupted. Further, notwithstanding the contract claims/treaty claims distinction, it is recognized that both types of claims may involve the same damages.<sup>332</sup> That the claimants in the various claims may be different does not allay double recovery concerns. Thus, if despite the absence of privity shareholders can claim damages for measures affecting the company's contracts via treaty claims, the settlement by the company of its contract claims involving the same damages should weigh on the admissibility of such treaty claims.<sup>333</sup>

### III. CONCLUSION

International tribunals have discussed the position of shareholders in international law in different contexts. Complexities arise from potential overlaps between shareholders' rights, interests, and claims and those of the company and from the amalgam of national and international law provisions to which these rights, interests, and claims are subject. In *Barcelona Traction*, the ICJ drew a distinction between the rights of the company and those of the shareholders under general international law,<sup>334</sup> which it 'rigorously'

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<sup>328</sup> Sinclair (2013) 222. The privity notion is also recognized by international law in respect of international obligations. See *Reparation for Injuries*, 181; VCLT, Arts 34-38.

<sup>329</sup> Arato (2016) 12.

<sup>330</sup> Haersolte-Van Hof and Hoffmann (2008) 968; McLachlan (2008) 417.

<sup>331</sup> *Parkerings* [316].

<sup>332</sup> *Wena* (Annulment) [49]; *Desert Line* [136].

<sup>333</sup> Bagge argued that when there is a settlement between the affected entity and the state that adopted the measures, 'no claim on the international plane can be put forward on the basis of the damage caused to the shareholder.' Bagge (1958) 170.

<sup>334</sup> *Barcelona Traction* (Second Phase) [44-47].

endorsed in the *Diallo* case.<sup>335</sup> But this distinction, while fundamental in *Barcelona Traction*<sup>336</sup> and still applicable even in the specialized context of international investment law, does not have fixed boundaries. International law may grant shareholders new rights whose object may coincide, totally or partially, with some of the company's rights. For example, IIAs' protection of indirect interests or control over assets may effectively grant shareholders international law entitlements over the company's assets.

There is little reflection, for purposes other than jurisdiction, of the relationship between shareholder treaty claims and the company's non-international claims. Prevailing views on shareholder claims have been based on IIAs as *lex specialis*. Investment tribunals have consistently affirmed their jurisdiction over claims by shareholders regarding measures taken vis-à-vis the company. The thrust of these arbitral decisions is that shareholders assert their own rights in treaty claims, to be distinguished from the company's rights that may be asserted in contract or national law claims. However, the relevant rationales are often based merely on shares' status as a protected investment. But such status does not establish precisely which rights shareholders have,<sup>337</sup> nor does it justify an abandonment of the separation between the company and its shareholders<sup>338</sup> through the prevailing idea of the independence of shareholder treaty claims. Shareholder IIA claims for harm to the company's assets are substantively less independent from the company's claims than shareholder direct claims as described by the ICJ in *Barcelona Traction* (if only because they generally involve the same damage).

This chapter argued that there is a substantive overlap between shareholder treaty rights and company rights under contracts and national law, notwithstanding prevailing theories on shareholders' 'independent right of action'—which *Barcelona Traction* itself acknowledged. This overlap may have little or no relevance for jurisdictional determinations, which hinge on the existence of consent to international jurisdiction. But it cannot be ignored for the admissibility and merits of investment claims. Important principles of international law (even if developed in the context of diplomatic protection) and national law relative to the position of companies and shareholders apply. These principles include the company's independent personality; the distinction between the

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<sup>335</sup> *Diallo* (Merits) [115].

<sup>336</sup> *Rompetrol* (Jurisdiction) [90].

<sup>337</sup> Müller (2015) 332.

<sup>338</sup> *Ibid*, 365.

assets and rights of the company and those of the shareholders; the need to take a substantive rather than formalistic view of the nature of shareholder and company claims; and the importance of considering not only the rights and interests of the shareholder but also those of the corporate entity and the third parties who have dealings with it.

The position in international investment law that shareholders in indirect claims invoke only their own treaty rights, which are independent from the company's 'local' rights, is artificial. Shareholders exercise both their own treaty rights as well as contractual and national law rights belonging to the company, which often entails disregarding privity of contract. When this is deemed justified in the circumstances, it should work both ways. That the shareholder is not a party to the contract should not prevent the respondent state from invoking the contract against a treaty claim for admissibility or merits purposes. Further, to the extent local courts are supposed to take into account the result of the IIA claim to avoid double recovery, the local company may be deprived of its own rights as a result of the treaty claim. Investment tribunals should consider whether shareholder protection requires this potential deprivation and, if so, whether the interests of third parties, including the company's creditors, are adequately protected.

One of the reasons behind the virtually complete lack of consideration of these aspects is that current approaches to shareholder standing focus almost exclusively on jurisdictional aspects. Yet jurisdictional decisions do not contain a discussion as to how to distinguish the substance of shareholder and company rights, even when the claims clearly referred to alleged injury to corporate assets. This discussion is generally not present in merits decisions either. Further, investment tribunals often consider that their jurisdiction hinges almost exclusively on a few specific provisions of the applicable IIA. Thus, substantive principles of general international law have had a limited role in jurisdictional determinations concerning shareholder standing; and national law principles almost none. However, serious consideration of national and general international law rules on the interrelation between shareholder and company rights may contribute to avoiding undesirable consequences of shareholder treaty claims, including the prosecution of overlapping claims by different entities and prejudice to the rights of third parties.

## 5 *Damages in Shareholder Treaty Claims*

[T]he Tribunal will remain vigilant about the possibility of double recovery that might result from any intersection between the treaty claims and the contract claims.<sup>1</sup>

Admissibility includes circumstances that lead a tribunal not to hear a claim or to reject it after hearing the evidence but without deciding the ultimate merits. By contrast, a decision on the merits is a precondition for the granting of damages. Damages are the ultimate goal of almost all investment claims and are thus fundamental in determining the substance of the claims. They allow to identify the claim's core, no matter how the claim is otherwise characterized or what conceptual distinctions are used to distinguish it from other claims. Nor do standing or cause of action alter such core. When the losses involved are the same, any alleged independence between the relevant claims for admissibility or merits purposes collapses. By considering the damages sought, one can compare the substance of the different claims.

Investment tribunals have considered overlaps between contract and treaty claims at the quantum phase.<sup>2</sup> The *CME* tribunal stated that even if local and international proceedings have the same object, i.e., compensation for injury to the investment, the jurisdiction of neither forum is affected.<sup>3</sup> It considered such overlaps as irrelevant also for merits purposes, although decisions in overlapping proceedings could impact the quantum of the damages.<sup>4</sup> Further, commentators argue that the applicable rules allow parallel proceedings that are 'identical or highly similar in economic and factual terms'.<sup>5</sup> Accordingly, any coordination between them must 'take place on the level of remedies and compensation'.<sup>6</sup> In international investment law, thus, given the differences in the causes of action (contract/treaty) and subjects involved (company/shareholders), possible

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<sup>1</sup> *EDF* (Jurisdiction) [219].

<sup>2</sup> *CME* (Partial Award) [404]. See also e.g. *UPS* (Merits) [35]; *Arif* [368]; *Daimler* [155]; *Urbaser* (Jurisdiction) [253]. On international tribunals generally see Lowe (1999) 203.

<sup>3</sup> *CME* (Partial Award) [410].

<sup>4</sup> *Ibid* [410, 415, 575].

<sup>5</sup> Wälde and Sabahi (2008) 1103.

<sup>6</sup> *Ibid*.

overlaps between contract and treaty claims appear largely irrelevant, except for quantum purposes.<sup>7</sup>

The reason for allowing consideration of the consequences of substantive overlaps between related claims only at the damages phase (if at all) is unclear. On the one hand, in discussing jurisdiction over claims on account of shareholder ‘derivative prejudice’, the tribunal in *Gami* stressed that uncertainty as to whether there is ‘sufficient directness’ between a host state measure and damage to the shareholder’s investment ‘is not an obstacle to jurisdiction’.<sup>8</sup> Whether the shareholder can prove damage to its investment and to what extent such damage is different from one suffered by the company should not deprive the shareholder of its day in court. On the other hand, when considering damages, investment tribunals have generally described the avoidance of double recovery as being prohibited by a ‘well-established principle’.<sup>9</sup> The *Venezuela Holdings* tribunal related this prohibition to unjust enrichment.<sup>10</sup> Arguably, avoiding double recovery and/or double payment seems to require a ‘substantive’ approach to the subject matter of investment claims. If claimants could circumvent the prohibition on double recovery simply by pointing to differences in the causes of action or the identity of the claimants, little would be left of this well-established principle.<sup>11</sup>

Substantive overlaps between claims affect admissibility more generally, even if the claims were brought by different entities and invoke different causes of action.<sup>12</sup> The damages claimed in each case are of the essence, since they are the main element that determines whether the substance of the claims is the same. Actual or potential overlaps in the damages require revisiting the idea of independence of shareholder rights and treaty claims in relation to standing and cause of action. If the damages being claimed are the same, notwithstanding the jurisdictional position, are there reasons to conclude that all or

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<sup>7</sup> A similar observation applies to claims under different IIAs; the cause of action would be different and the claimants would differ too (an entity protected under treaty X in one claim and an entity protected under treaty Y in the other claim). For the *Orascom* tribunal, however, investment arbitration has evolved and currently ‘an investor who controls several entities in a vertical chain of companies may commit an abuse if it seeks to impugn the same host state measures and claims for the same harm at various levels of the chain’, relying on several IIAs. This abuse may constitute an inadmissibility ground. *Orascom* [539-547]. See also *Ampal* (Jurisdiction) [330-331]; Gaillard (2017) 24-25.

<sup>8</sup> *Gami* [27-33].

<sup>9</sup> *Venezuela Holdings* [378].

<sup>10</sup> *Ibid.*

<sup>11</sup> See Crivellaro (2005) 97-98.

<sup>12</sup> Even the *CME* tribunal did not rule out this possibility completely. See *CME* (Partial Award) [419].



part of the damages should go to someone different from the IIA claimant (with the result that all or part of the IIA claim is inadmissible)? Further, should an investment tribunal defer to another tribunal (e.g. the contractual forum) for adjudicating all or part of the damages in question under a different legal basis? The relevance of these questions, however, depends on the answer to an antecedent question: are the damages generally claimed in shareholder treaty claims the same as those that may be claimed in contract claims?

Part I of this chapter discusses damages in relation to shareholders' IIA rights. It compares shareholder claims involving injury to the company's assets with claims for diminution in the share value. The potential impact on admissibility of the corporate structure's characteristics and third-party interests is also considered. Part II refers to the relationship between the cause of action and the damages claimed. It discusses whether 'contract' and 'treaty' damages are different and considers the related issues of overlapping entitlements over the same assets and of claims for the same damage before different jurisdictions. The chapter concludes by arguing that the damage involved in shareholder indirect claims under IIAs and in related contract claims is quintessentially the same. Based on this substantive overlap, investment tribunals should assess the admissibility of shareholder claims considering, first, that not only the local company, as the contractual party, but also third parties may have rights/interests in relation to the same losses, and second, the well-established need to avoid, directly or indirectly, multiple compensation.

## I. DAMAGES AND SHAREHOLDER STANDING

### A Overview

The general acceptance of shareholder indirect claims, as a jurisdictional matter, rests upon the notion that shareholders invoke their own rights—granted by IIAs—rather than the company's rights. A different matter, however, is precisely what damages they are claiming. What is the relationship between shareholders' 'treaty' rights and their damages claims? What international law requires is a breach of a shareholder's right by a measure that has a 'sufficiently direct and certain causal nexus'<sup>13</sup> with an injury suffered by this

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<sup>13</sup> *Application Genocide Convention I* [462]; *Diallo* (Damages), 332.

shareholder.<sup>14</sup> Further, the tribunal in *Siemens* observed, referring to shareholder indirect claims, that the damage suffered by the company must ‘have a detrimental effect on the investment’, which is ‘the cause of the State’s responsibility under the Treaty.’<sup>15</sup>

Yet the requirements that a right of the shareholder must have been breached and that there must be a detrimental effect on its investment—and not just on the company in which it holds shares<sup>16</sup>—do not resolve the complexities of overlapping shareholder and company claims. First, given the breadth of IIA standards of treatment, requiring that a shareholder right must have been violated and that the shareholder is thus the person affected by the breach,<sup>17</sup> does not say much as to the losses for which shareholders may be compensated. For example, if the right under the fair and equitable treatment standard is simply that the investment be treated fairly and equitably, the possibilities for a shareholder to argue that this right has been breached are considerable (notwithstanding any property rights other people may hold over the relevant assets). Second, assuming a shareholder establishes that its IIA rights have been breached, can it directly claim to be compensated for the offending measure’s impact on the company’s assets? If so, does this simply mean that IIAs add an international cause of action to the one available to the local company? If shareholders can only claim for the impact on the value of their shares, is this damage different from the one suffered by the company as a result of the same measure? These questions are considered in the next three sections.

### 1 *Injury to the company’s assets*

As a matter of principle, international investment law acknowledges the ‘separation of property rights as between company and shareholder’,<sup>18</sup> including in damages calculations.<sup>19</sup> The separation is recognized by national legal systems as ‘an important manifestation’ of the ‘firm distinction between the separate entity of the company and

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<sup>14</sup> To be able to claim reparation, the shareholder must be the person who suffered the damage. Müller (2015) 30.

<sup>15</sup> *Siemens* (Jurisdiction) [138].

<sup>16</sup> Ripinsky and Williams state that, according to investment tribunals, ‘compensation to the claimant-shareholder must be measured by reference to the impact of the State conduct on the claimant’s financial position as a shareholder’. Ripinsky and Williams (2008) 157.

<sup>17</sup> Müller (2015) 34.

<sup>18</sup> *Barcelona Traction* (Second Phase) [41].

<sup>19</sup> Ripinsky and Williams (2008) 161.

that of the shareholder, each with a distinct set of rights'.<sup>20</sup> By contrast, some investment tribunals have advanced that it is immaterial whether the assets and rights forming the investment protected by the IIA belong not to the shareholders but to local companies under national law.<sup>21</sup> In their damages claims, shareholders assert their 'own treaty rights for their protection, regardless of any right, contractual or non-contractual that [local companies] might assert in respect of such assets and rights under local law'.<sup>22</sup> Other tribunals have stated that, provided the company's rights and assets are themselves protected investments under the applicable IIA, shareholders have 'an indirect interest in those same rights'.<sup>23</sup>

Despite recognizing indirect treaty interests or rights over the company's assets, investment tribunals have often refrained from expressly asserting shareholders' right to directly claim for harms to such rights and assets.<sup>24</sup> The award in *El Paso* dealt with claims involving contractual and legal rights of local companies under the electricity and hydrocarbons regulatory frameworks.<sup>25</sup> The tribunal suggested that to the extent the local companies themselves were not protected investments,<sup>26</sup> shareholders could not claim for the companies' rights.<sup>27</sup> The tribunal in *Poštová Banka*, referring to Greek government bonds owned by a local entity,<sup>28</sup> concluded that a shareholder of a company incorporated in the host state had 'no standing to pursue claims directly over the assets of the local company, as it has no legal right to such assets'.<sup>29</sup> Along the same lines, shareholder claims for debts owed to the company have been generally rejected.<sup>30</sup>

Yet the tribunal in *El Paso* contended that when the investment is in shares of a company whose agreements have been affected by the state measure, 'the damage to that

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<sup>20</sup> *Ibid.*

<sup>21</sup> *Total (Jurisdiction)* [80].

<sup>22</sup> *Ibid.*

<sup>23</sup> *Suez ARB/03/17 (Liability)* [119]; *Suez ARB/03/19 (Liability)* [130].

<sup>24</sup> At most, tribunals refer to the possibility under IIAs of shareholders 'bring[ing] claims for harms to their investments in locally incorporated companies'. *Daimler* [91].

<sup>25</sup> *El Paso (Award)* [155-156, 178].

<sup>26</sup> IIAs sometimes include companies and other legal entities themselves—not only shares in companies—as protected investments. See e.g. Argentina-US BIT, Art I.1 a) ii); Canada-Cameroon BIT, Art 1.

<sup>27</sup> *El Paso (Award)* [188].

<sup>28</sup> *Poštová Banka* [44, 228].

<sup>29</sup> *Ibid* [245].

<sup>30</sup> *Azurix (Award)* [431].

investment caused by the breach of the BIT must obviously be calculated by taking into account any benefits accruing from the agreements in question or from the Government's measures'.<sup>31</sup> This tribunal had previously found, however, that because the claimant had signed no contract with the government it held 'no contractual rights to be protected'.<sup>32</sup> Thus, in principle 'any benefits accruing from the agreements' would seem to belong to the company, not the shareholders. Similarly, in the award in *Suez II* the tribunal noted that shareholders'

investments were not fixed, physical assets, such as a factory or a pipeline, whose valuation usually may be made relatively easily. Instead, what the Claimants lost in these cases at the time of the measures taken in violation of the applicable treaties was the stream of revenue, often referred to as a 'cash flow,' expected to be received over the remaining term of the Concession Contract.<sup>33</sup>

In this case, however, it was also the local company that had the 'legal right to receive a stream of revenue' under the contract.<sup>34</sup>

Hence, for the tribunal in *El Paso* shareholders cannot claim directly for the company's contractual rights, but any benefits under the contracts may be taken into account in assessing shareholder compensation. For the *Suez II* tribunal the justification for compensating shareholders was their 'indirect interest' over the company's contractual rights.<sup>35</sup> Kantor argued that when a breach of contract is involved, an investor in an IIA case 'may present a traditional "breach of contract/lost profit" computation'.<sup>36</sup> Yet, whatever the legal justification, the contractual 'stream of revenue' that is taken into account by IIA tribunals is the same contractual cash flow over which the local company has direct contract rights. The state measure affecting the contract may have simultaneously breached distinct treaty rights of the shareholder and contract rights of the local company, but the loss caused by the measure is in principle the same. Here, there is no independence between the damage to the shareholder and the damage to the company.

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<sup>31</sup> *El Paso* (Award) [550].

<sup>32</sup> *Ibid* [189].

<sup>33</sup> *Suez II* (Award) [29].

<sup>34</sup> *Ibid* [130].

<sup>35</sup> *Ibid*. See also Lowe (2010) 1015.

<sup>36</sup> Kantor (2008) 43.

## 2 *Injury to the share value*

In *Barcelona Traction*, the ICJ observed that a violation of the company's rights frequently prejudices its shareholders.<sup>37</sup> Although this did not mean that both had the right to be compensated, it was clear that the same measure could simultaneously injure several persons.<sup>38</sup> Belgium's claim on behalf of Belgian shareholders was premised on the loss suffered by the company, in proportion to the shares held by them.<sup>39</sup> Spain acknowledged there was a relationship between the value of the company's assets and that of its shares, in that an injury to the company's affairs would cause a fall in the value of these shares.<sup>40</sup> Yet Spain stressed the difference between the damage suffered by the company and that suffered by its shareholders.<sup>41</sup> A compensation for shareholders calculated on the basis of the reduction in the value of their shares was unobjectionable.<sup>42</sup> But calculating shareholder compensation taking into account the injury to the company's assets was abusive.<sup>43</sup>

For the tribunal in *El Paso*, the claimant could not claim 'once for the taking of the rights of the [local] companies and once for the diminution in value of the shares of those companies'.<sup>44</sup> Here, the loss of value of the claimant's shares was found to be related to measures affecting the local companies' rights under contracts and national law.<sup>45</sup> Allowing claims 'for the loss of value of its shares in the companies and for the prejudice suffered by the latter, would [have amounted] to compensating the Claimant twice'.<sup>46</sup> While endorsing the views adopted in *El Paso*,<sup>47</sup> the tribunal in *Poštová Banka* went a step further and postulated a general principle (albeit obiter dictum, since the case was rejected on jurisdictional grounds). It accepted that shareholders may assert claims referring to measures causing prejudice to the 'local company's contracts and assets', but

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<sup>37</sup> *Barcelona Traction* (Second Phase) [44].

<sup>38</sup> *Ibid.* See also *Diallo* (Merits), 689.

<sup>39</sup> *Belgium's Reply* (1967), 635.

<sup>40</sup> *Spain's Counter-Memorial* (1965), 398.

<sup>41</sup> *Ibid.*, 649; *Spain's Rejoinder* (1968), 861.

<sup>42</sup> *Spain's Rejoinder* (1968), 863.

<sup>43</sup> *Ibid.*

<sup>44</sup> *El Paso* (Award) [175].

<sup>45</sup> *Ibid.* [204].

<sup>46</sup> *Ibid.*

<sup>47</sup> *Poštová Banka* [236].

‘only to the extent that those claims are related to the effects that the measures taken against the company’s assets have on the value of the claimant’s shares in such company’.<sup>48</sup>

Whether shareholders can claim for measures affecting the value of their shares through the treatment of the company’s assets may be thought of in terms of strictly what rights shareholders hold. In *Barcelona Traction*, Fitzmaurice posited shareholders do not have a ‘legal right’ that shares ‘shall have or be maintained at, any particular market value’.<sup>49</sup> More recently, however, it has been suggested that shareholders’ property rights include the value of their shares.<sup>50</sup> Under modern IIAs, shares—even if held through intermediary companies—are generally a protected investment<sup>51</sup> and certain investor rights are broadly defined. Thus, a case that a shareholder treaty right has been breached and that the damage consists in the reduction in the value of the shareholder’s investment is often not hard to make (leaving aside causation between the breach and the damage, which depends on the relevant facts).<sup>52</sup> More relevant here, however, is to what extent damage calculated on the basis of the share value differs from damage stemming from a measure’s impact on the company’s assets. The point is discussed below.

### 3 *Protection of value?*

Do IIAs protect the value of investments? Douglas is right in affirming that for a state to be liable under an IIA the diminution or even the destruction of the value of an investment is not enough; a treaty obligation must have been breached.<sup>53</sup> But he also observes that whatever the investment invoked, the rights constituting the investment ‘are converted into units of value when it comes to the assessment of damages’.<sup>54</sup> In principle, a

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<sup>48</sup> Ibid [232]. See also *Gas Natural* [35]; *Enkev* [232].

<sup>49</sup> *Barcelona Traction* (Second Phase), 68 (Sep Op, Fitzmaurice). See also Müller (2015) 298-299.

<sup>50</sup> *Gami* [129]; *CME* (Partial Award) [392]; *Yukos* (Jurisdiction) [372]; *Isolux* [834]. But see *Saur* (Jurisdiction 2006) [79].

<sup>51</sup> Bentolila argues that because IIAs ‘protect property holders (investors) against loss suffered on their property (investment)... a loss incurred on the value of the share should grant the shareholder a right to claim reparation’. Bentolila (2010) 97. However, the host state does not breach a shareholder treaty right merely by adopting a measure that reduces the value of the shares.

<sup>52</sup> See e.g. *EDF* (Jurisdiction) [207]. The *Encana* tribunal required that the affected rights exist under national law for an expropriation to be possible. *Encana* (Award) [184]. But under other standards investment tribunals have not generally required the existence of a right recognized by national law for a breach of the IIA to be possible.

<sup>53</sup> Douglas (2014) 403.

<sup>54</sup> Ibid.

shareholder can claim for the diminution in the value of its shares caused by an act infringing its rights under an IIA. Assuming causality is demonstrated,<sup>55</sup> it is a loss suffered by the shareholder caused by an illegal act. Yet it is necessary to consider how the value of shares is generally calculated in investment arbitration, in order to determine whether it is different from the value considered in other types of claims.

*(a) Standards of compensation and equity valuation*

Among the three forms of reparation recognized under international law—restitution, compensation, and satisfaction<sup>56</sup>—compensation and in particular monetary compensation is by far the most commonly used.<sup>57</sup> As a matter of principle, compensation ‘shall cover any financially assessable damage including loss of profits insofar as it is established’.<sup>58</sup> Investment tribunals often refer to a distinction between compensation for lawful expropriation, on the one hand, and compensation for unlawful expropriation<sup>59</sup> and breaches of other standards of treatment, on the other. The requirement of compensation is part of the primary rule in the case of lawful expropriations, while paying compensation or damages<sup>60</sup> is a legal consequence flowing from the internationally wrongful act in the case of unlawful expropriations.<sup>61</sup>

As regards lawful expropriations, while the terms of the relevant provisions vary, IIAs generally require that the expropriating state pay a ‘just’<sup>62</sup> or ‘adequate’<sup>63</sup> compensation. This compensation is defined, in more or less similar terms, as the ‘equivalent to the fair market value of the expropriated investment’.<sup>64</sup> With respect to

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<sup>55</sup> The legal and valuation complexities involved in linking a diminution in share value to a specific state measure may be significant.

<sup>56</sup> ILC Commentaries, 95.

<sup>57</sup> Ripinsky and Williams (2008) 49.

<sup>58</sup> ILC Commentaries, 98.

<sup>59</sup> See Hepburn (2017) 91. The relevance of the distinction between lawful and unlawful expropriations has been questioned, however. See Paulsson (2005-III) 789; Ratner (2017).

<sup>60</sup> The *LG&E* tribunal noted that ‘there may be a difference between “compensation” as the consequence of a legal act and “damages” as the consequence of the committing of a wrongful act’. *LG&E* (Award), para 38. The distinction is not widely, let alone consistently, made in international law. For example, the ILC Articles on State Responsibility did not adopt it. *Ibid.* But see Burgstaller and Ketcheson (2017) 198. Unless otherwise stated, the terms compensation and damages are used interchangeably in this thesis.

<sup>61</sup> Burgstaller and Ketcheson (2017) 198.

<sup>62</sup> See e.g. Cyprus-Hungary BIT, Art 4.1(c).

<sup>63</sup> See e.g. Argentina-US BIT, Art IV.1

<sup>64</sup> *Ibid.* It has been argued that fair market value is also the rule under general international law. *AIG*, 106. Fair market value is generally defined as ‘[t]he price, expressed in terms of cash equivalents, at which

unlawful expropriations<sup>65</sup> and breaches of other IIA standards, application of the *Chorzów Factory* principle of full reparation is the general rule.<sup>66</sup> Yet even in this latter context, the ‘fair market value’ standard of compensation is frequently relevant.<sup>67</sup> First, because in the case of illegal expropriations this value is often taken into account at least as a starting point to which other damages may be added or the figure be then otherwise adjusted.<sup>68</sup> Second, several investment tribunals have applied the fair market value standard to breaches of standards of treatment other than expropriation, not least the fair and equitable treatment standard.<sup>69</sup>

Fair market value may be calculated through a variety of valuation methods.<sup>70</sup> Among the ‘income-based methods’,<sup>71</sup> discounted cash flow (DCF) has become the most popular among investment tribunals.<sup>72</sup> According to the World Bank Guidelines on the Treatment of Foreign Direct Investment, DCF ‘means the cash receipts realistically expected from the enterprise in each future year of its economic life as reasonably projected minus that year’s expected cash expenditure, after discounting this net cash flow for each year by a factor which reflects the time value of money, expected inflation, and the risk associated with such cash flow under realistic circumstances’.<sup>73</sup> In finance, DCF approaches are preferred ‘because they are the epitome of how we describe value: that is, the present value of expected cash flows’.<sup>74</sup>

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property would change hands between a hypothetical willing and able buyer and a hypothetical willing and able seller, acting at arm’s length in an open and unrestricted market, when neither is under compulsion to buy or sell and when both have reasonable knowledge of the relevant facts’. *ASA Standards*, 27.

<sup>65</sup> Marboe notes that according to investment tribunals’ prevailing view, ‘the payment of no or only little compensation does not render the underlying taking *ipso facto* wrongful’. Marboe (2015) 1061.

<sup>66</sup> Burgstaller and Ketcheson (2017) 202; *ADC* [483-490]; *British Caribbean Bank* [288]; *Rusoro* [640].

<sup>67</sup> Ripinsky and Williams (2008) 79.

<sup>68</sup> See e.g. *ADC* [499].

<sup>69</sup> See *CMS* (Award) [410]; *Azurix* (Award) [424]. But see *LG&E* (Award) [35].

<sup>70</sup> Marboe (2015) 1067. See also Walck (2015) 1046-1047 (referring to ‘(a) cost- or asset-based methods, (b) market- or transactions-based methods and (c) income-based methods’).

<sup>71</sup> The idea that underlies these methods is that ‘the value of income-producing capital assets or enterprise to its present owner or to a potential private purchaser is a function of the cash that the asset or enterprise is expected to generate in the future.’ Lieblich (1991) 61.

<sup>72</sup> Kinnear (2010) 563; *OI European Group* [658]; *Tidewater* [156]; *Rusoro* [758].

<sup>73</sup> World Bank Guidelines, IV.6.

<sup>74</sup> Reilly and Brown (2004) 378. See also Friedland and Wong (1991) 407; Damodaran (2012) 11 (DCF is ‘the foundation on which all other valuation approaches are built’).



There are several variants of the DCF method for purposes of valuing companies and stocks. These variants depend basically on how the cash flows to be considered are defined. In dividend discount models, the dividends are the cash flows used to value equity.<sup>75</sup> More widely used in investment arbitration, however, is the ‘free cash flow model’. This model focuses on the part of the company’s cash flow from operations that is ‘free’, in that it does not need to be reinvested or used to acquire new assets.<sup>76</sup> Equity may be valued considering the free cash flow to the firm (FCFF). This cash flow is the one generated by the company’s operations, from which capital expenditures are deducted (these expenditures being the reinvestment required to keep the company as a going concern).<sup>77</sup> Here, the value of equity ‘is the present value of expected future FCFF—the total value of the company—minus the market value of outstanding debt’.<sup>78</sup> Otherwise, the free cash flow to equity (FCFE) may be considered. The FCFE also consists of the cash flow generated by the company’s operations minus capital expenditures, but with the further deduction of debt payments in each relevant period as such payments become due.<sup>79</sup> Here the equity value is simply the present value of the expected cash flow to equity,<sup>80</sup> since debt is deducted from future cash flows before discounting them back to the valuation date. In both cases, discounting is done to express the aggregate value of cash flows at the valuation date, factoring in the time value of money, inflation, and risk. Under the FCFF method, future cash flows are discounted at the weighted average cost of capital (WACC)—i.e., the cost of equity and the cost of debt—, because such cash flows still include the debt. Under the FCFE method, cash flows, from which debt has already been deducted, are discounted at the cost of equity.<sup>81</sup>

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<sup>75</sup> Damodaran (2012) 20.

<sup>76</sup> Stowe, Robinson, Pinto, and McLeavey (2007) 45.

<sup>77</sup> Ibid.

<sup>78</sup> Ibid.

<sup>79</sup> Ibid.

<sup>80</sup> Ibid.

<sup>81</sup> CMS (Award) [430].

(b) *Damage valuation under IIAs*

All valuation techniques seek to determine value.<sup>82</sup> In the case of companies, value lies in the cash flows that the company's assets are expected to generate in the future.<sup>83</sup> As a rule, this expectation is what markets take into account to value companies and stocks.<sup>84</sup> Investment tribunals generally use a similar concept of value, which coincides with 'market value', i.e., 'what a willing buyer would pay a willing seller'.<sup>85</sup> Valuation techniques, however, are not concerned with legal considerations relating to standing and cause of action. After all, they have been developed in non-legal contexts, for purposes other than calculating damages in legal disputes.<sup>86</sup> Still, in the practice of investment tribunals the diminution in value of an investment frequently determines the amount of compensation.<sup>87</sup> Thus, while the application of valuation techniques is often necessary in investment arbitration, any limits to the admissibility of damages claims, including those related to standing and cause of action aspects, must be based on legal considerations.

In corporate finance, the cash flows used for valuation purposes can be defined in different ways (cash flows to the firm, cash flows to equity, dividends, etc.), depending on the method to be applied. However, this thesis argues that in a shareholder claim in respect of a state measure taken vis-à-vis the company, the cash flow impacted by the measure is in principle always the same, i.e., the company's cash flows. The different valuation methodologies seek to i) determine the damage caused by the challenged measures, excluding other factors, by comparing the real scenario (which may include estimations in respect of future periods) and a hypothetical scenario in which these measures are not present, and ii) calculate what portion of the damage corresponds to the shareholder claimant. Yet even if calculated as the diminution of the value of the claimant's shareholding—by somehow deducting the debt, etc.—the damage caused by the measures is always the same.<sup>88</sup> At best it may be said, in financial terms, that the damage

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<sup>82</sup> Although the term value may be defined in many ways. See Pratt, Reilly, and Schweih (2000) 28.

<sup>83</sup> Or, more precisely, 'the level of, uncertainty about and expected growth in these cashflows'. Damodaran (2012) 1.

<sup>84</sup> Copeland, Koller, and Murrin (1994) 70.

<sup>85</sup> *Suez I* (Award) [87]; Ripinsky and Williams (2008) 182-183.

<sup>86</sup> The ILC has observed that '[a]lthough developed as a tool for assessing commercial value, [the DCF method] can also be useful in the context of calculating value for compensation purposes'. ILC Commentaries, 103.

<sup>87</sup> Ripinsky and Williams (2008) 262.

<sup>88</sup> See *Diallo* (Damages), 391-392 (Dec, Greenwood); *El Paso* (Award), [174-175].

is calculated either at the level of the firm or at the level of the shareholders after subtracting the debt.

Both from the perspective of investment tribunals and of some of the most commonly used valuation techniques, the cash flows to the firm are a fundamental element. Thus, on the one hand, tribunals have referred to the ‘benefits accruing from the [company’s] agreements’,<sup>89</sup> the ‘stream of revenue’ expected under a contract to which the company is a party,<sup>90</sup> and similar concepts in determining shareholder compensation. On the other hand, the two free cash flow models, FCFF and FCFE, consider the company’s cash flow but differ in the discount rate to be applied and in how debt is accounted for in the calculations. These differences are relevant in terms of the valuation processes to be followed,<sup>91</sup> but not in legal terms. In the final analysis, after often complex calculations, in both cases the shareholder’s value will consist of the company’s expected cash flows minus the debt. And even the dividend discount model assumes and relies on the existence of a cash flow to the firm, which will eventually allow the payment of dividends in accordance with any assumed dividend policy.

As to the notion that shareholders may claim only for the effects that measures taken vis-à-vis the company’s assets have on the share value, the *Poštová Banka* tribunal based this proposition on *CMS* and *El Paso*.<sup>92</sup> In *CMS*, the tribunal adopted fair market value as the standard of compensation and discounted cash flow as the valuation method.<sup>93</sup> Consistent with accepted theory, while the tribunal took into account the cash flows to equity to calculate damages, these cash flows were defined as ‘cash flows from operations, minus interest and debt repayments’.<sup>94</sup> ‘Cash flows from operations’ were the local company’s cash flows. The *El Paso* tribunal also adopted fair market value as the compensation standard as well as DCF as the valuation method.<sup>95</sup> DCF allows measuring the companies’ capacity ‘to generate returns’.<sup>96</sup> This tribunal argued, moreover, that the

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<sup>89</sup> *El Paso* (Award) [550].

<sup>90</sup> *Suez II* (Award) [29].

<sup>91</sup> In theory, however, both models should yield the same result. Damodaran (2012) 17-18.

<sup>92</sup> *Poštová Banka* [237-245].

<sup>93</sup> *CMS* (Award) [409-411].

<sup>94</sup> *Ibid* [430-433].

<sup>95</sup> *El Paso* (Award) [700-712].

<sup>96</sup> *Ibid* [712].

DCF method applied in the case considered only the loss of value of the claimant's investment, i.e., shares in local companies.<sup>97</sup> Yet here again, the cash flows used to apply the DCF were built on 'sales volumes and costs' of the local companies.<sup>98</sup>

Here, since the reduction in the value of the IIA claimant's shareholding is calculated based on the impact on the company's cash flows, there is only one damage caused by the relevant measure.<sup>99</sup> This conclusion is not affected by the claimant invoking its own treaty rights as a shareholder, rather than the company claiming for its own rights. It may be argued, however, that by somehow arriving at the damage caused to the equity—rather than to the firm—one is calculating the actual damage to the shareholder. Further, equity value must reflect shareholders' share of the company's assets, even though shareholders have no direct claim to these assets.<sup>100</sup> By protecting shares, IIAs allow shareholders to bring claims in respect of any reduction in equity value caused by a state measure in breach of the treaty, even if under national law the affected asset belongs to the company and not to the shareholders. The shareholder claims 'for his *own* right and his *own* loss - inflicted on his *own* assets (shares) and not on the assets of the company'.<sup>101</sup>

However, it is one thing to accept investment tribunals' jurisdiction over shareholder claims against measures affecting the company's assets in light of IIA provisions. A different matter is whether these tribunals should ignore, in considering the substance of the claims, that: i) it is the company in the first instance that suffers the damage and it is this same damage the one invoked by the shareholder in the treaty claim (even if described as the shareholder's own 'indirect' loss<sup>102</sup>); and ii) most valuation techniques—not least DCF methods—make a series of assumptions including that, absent the measures, dividends and debts would have been paid (even if the creditors have, in fact, not been paid anything as of the valuation date). Whether it is necessary and reasonable to make these assumptions from a valuation perspective depends on the requirements of each valuation method, the circumstances of the company or equity being valued, etc. Purely

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<sup>97</sup> Ibid [685-687].

<sup>98</sup> Ibid [715]. See also *Hochtief* (Liability) [315-316].

<sup>99</sup> See *Orascom* [498]; *Ampal* (Liability) [268].

<sup>100</sup> Damodaran (2012) 221.

<sup>101</sup> Bentolila (2010) 98 (emphasis in the original).

<sup>102</sup> Ibid, 99.

for valuation purposes, what is important is whether these assumptions are sound from the standpoint of hypothetical parties to a hypothetical market transaction.<sup>103</sup>

Admissibility of claims, however, is subject to different considerations. Even if IIAs are seen as ultimately protecting the investment's value against unlawful interferences, indirect shareholder claims involve the same assets on which the company and sometimes third parties also have rights under national law, irrespective of the valuation technique. Valuation techniques should not obscure the potential for double recovery and prejudice to third-party rights stemming from overlapping entitlements over the same assets.

## B Recovery and the corporate structure

Shareholder indirect claims involve compensation for a diminution in the value of assets that typically coincides with that which may be claimed by the company under local law (after certain adjustments related to the extent of the shareholding, the debt, etc.). According to investment tribunals, this same diminution in value or damage may be claimed by any entity with a shareholding interest in the local company, no matter how indirect.<sup>104</sup> After analysing arbitral decisions in cases in which 'the claimant is not the immediate shareholder of the affected company',<sup>105</sup> Schreuer concluded that

indirect shareholding by way of an intermediate company does not deprive the beneficial owner of its right to pursue claims for damage done to the company by the host State.<sup>106</sup>

Indirect shareholdings or, more generally, indirectly owned or controlled investments, are often expressly protected in IIAs.<sup>107</sup> Even when this is not the case, investment tribunals have allowed indirect shareholders to bring claims vis-à-vis measures taken against the

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<sup>103</sup> In a free cash flow to equity valuation, one is 'assuming that stockholders are entitled to these cash flows, even if managers do not choose to pay them out'. Damodaran (2012) 228.

<sup>104</sup> An entity of the corporate structure must be able to point to an IIA under which it is protected and to a breach of the treaty in order to bring an investment claim. Yet these are not very demanding requirements, given the ubiquity of IIAs, the broadness of standards of protection, and the possibility of 'treaty planning'. Valasek and Dumbery argue that 'the incorporation of a corporation in a jurisdiction having a wide network of investment treaties with other States' in order to ensure treaty protection is 'perfectly legitimate'. Valasek and Dumbery (2011) 59. See also Dolzer and Schreuer (2008) 54; Baumgartner (2016) 8. But see *Philip Morris v Australia* [535-588].

<sup>105</sup> Schreuer (2005) 10-15.

<sup>106</sup> Ibid, 15. Doubts have been expressed, however, in cases where final control of the investment is in the hands of a national of the host state. See *Tokios Tokelés* (Jurisdiction, Diss Op Weil).

<sup>107</sup> See e.g. CAFTA, Art 10.28.

company based on the broad definition of investment in IIAs.<sup>108</sup> Thus, the number of prospective claimants with respect to the same damage may be high.<sup>109</sup>

In light of investment tribunals' interpretations of their jurisdiction, which allows a plurality of claimants to sue states party to IIAs for the same damage,<sup>110</sup> the concept of admissibility must be applied in case of actual or potential overlapping damages claims. Investment tribunals must then decide whether a person different from the IIA claimant, not least within the same corporate structure, should be preferred for part or all of the compensation, thus rendering the claim inadmissible. Further, if for example the shareholder IIA claim is found inadmissible due to a parallel claim by the company, to the extent the latter is compensated, 'all of the companies higher up in the corporate chain, including the [shareholder IIA claimant], would have been made whole as well'.<sup>111</sup> However, the reverse is not true, i.e., if a shareholder is compensated, in principle the company (or, for that matter, any intermediary shareholder between the compensated shareholder and the company) is not made whole.<sup>112</sup>

#### 1 *The Enron and Sempra cases*

In *Enron*, claimants held indirect shareholdings in an Argentine gas transportation company through several layers of intermediary companies.<sup>113</sup> The ownership structure was made even more complex through arrangements under which the claimants assigned parts of their participations both to related subsidiaries and third parties.<sup>114</sup> The *Enron* tribunal observed that 'if minority shareholders can claim independently from the affected corporation, this could trigger an endless chain of claims, as any shareholder making an investment in a company that makes an investment in another company, and so on, could invoke a direct right of action for measures affecting a corporation at the end of the

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<sup>108</sup> See e.g. *Cemex* [149-158]; *EDF* (Jurisdiction) [161]; Chapter 4.

<sup>109</sup> Well-known instances of treaty claims by shareholders at different levels of the corporate structure in respect of the same damage are the *Lauder* and *CME* cases. See *Lauder* [143, 165, 172-173]; *CME* [5-7].

<sup>110</sup> Wälde and Sabahi (2008) 1102.

<sup>111</sup> *Orascom* [498].

<sup>112</sup> Müller (2015) 82-83.

<sup>113</sup> The published decisions do not specify the number of intermediary companies. As regards part of the shareholdings, however, there were at least three intermediary layers between the claimants and the local company. See *Enron* (Jurisdiction I) [21]; *Enron* (Award) [47].

<sup>114</sup> *Enron* (Award) [47-54].

chain'.<sup>115</sup> Similarly, in the *Sempra* case, which also involved indirect shareholdings albeit through only one layer of intermediary companies,<sup>116</sup> the tribunal acknowledged it was 'theoretically correct' that the current position on shareholder claims 'could lead to an unlimited chain of claims'.<sup>117</sup>

As to the possibility of multiple claims for the same damage by different entities of the same corporate network, the *Enron* tribunal referred to 'a need to establish a cut-off point beyond which claims would not be permissible as they would have only a remote connection to the affected company'.<sup>118</sup> This was 'in essence a question of admissibility of claims', which required 'establishing the extent of the consent to arbitration of the host State'.<sup>119</sup> On the facts of the case, the *Enron* tribunal concluded that because the claimants' investment had been 'specifically sought', the claimants were 'included within the consent to arbitration'.<sup>120</sup>

Both the *Enron* and *Sempra* tribunals referred again to the possibility of multiple compensation in their merits decisions. The *Enron* tribunal appeared to recognize that if any member of the corporate network is compensated, that is the 'end of the matter' as far as claims against the host state are concerned, whatever the position of the compensated entity in the corporate chain.<sup>121</sup> These merits decisions had to deal with the issue of potential double recovery resulting from tariff negotiations between the local company and the host government, on the one hand, and arbitral claims by foreign shareholders against measures affecting such tariffs, on the other.<sup>122</sup> Both tribunals were confident that 'able government negotiators or regulators would make sure that no such double recovery or effects occur'.<sup>123</sup>

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<sup>115</sup> *Enron* (Jurisdiction I) [50].

<sup>116</sup> *Sempra* (Jurisdiction) [77].

<sup>117</sup> *Ibid.*

<sup>118</sup> *Enron* (Jurisdiction I) [52]. See also Wälde and Sabahi (2008) 1102.

<sup>119</sup> *Enron* (Jurisdiction I) [52].

<sup>120</sup> *Ibid* [56].

<sup>121</sup> *Enron* (Award) [167, 211-212].

<sup>122</sup> *Ibid* [211-212]; *Sempra* (Award) [395].

<sup>123</sup> *Enron* (Award) [212]; *Sempra* (Award) [395].

## *2 Determining who should recover*

Two phenomena combine to increase the chances of multiple recovery. First, the prevailing view in investment arbitration is that any entity within a corporate chain has standing to sue in respect of measures taken against the local subsidiary, provided the entity that brings the claim qualifies for IIA protection.<sup>124</sup> Neither the overall size of the corporate structure nor the number of entities between the claimant and the company affected by the measure pose a jurisdictional hurdle, at least in principle. Second, while compensation is frequently said to be calculated based on the measure's impact on the value of the shares held by the claimant, many modern valuation techniques are in fact premised on the impact on the affected local company's cash flow. From this starting point, the damage 'suffered' by any related entity up the corporate chain is calculated. This calculation is not based on how the prices of the relevant stocks evolved (often the intermediary companies' shares are not listed on a stock exchange). It is a matter of reflecting, in terms of equity value and at the claimant's level in the corporate structure, the reduction suffered by the local company's cash flow, no matter how far apart in the structure the claimant is from this company.

For purposes of determining compensation for the consequences of an unlawful act, in principle only the damage suffered by the owner of the 'property, rights and interests' that has 'been affected' may be taken into account.<sup>125</sup> Yet this notion does not do much in terms of preventing potentially overlapping claims. All shareholders—both direct and indirect—forming a corporate network are probably able to argue that the value of their shareholdings has been affected by the same host state measure, not least by applying the valuation methods described above. The possibility of more than one recovery for the same damage<sup>126</sup> is not the only dimension, however. If many (generally related) legal entities can bring claims for the same damage—including the local company under national law—are there any reasons to prefer one entity over the other (either for all or part of the recovery)? Or is it just a matter of preferring the first claim that is ripe for resolution and brought to arbitration, as suggested by several investment tribunals?

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<sup>124</sup> Schreuer (2005) 20; Hansen (2010) 541.

<sup>125</sup> *Chorzów Factory* (Merits), 31.

<sup>126</sup> Wälde and Sabahi (2008) 1115.



Although international investment law does not condone double recovery, no discernible body of rules has emerged to decide who should recover and how much,<sup>127</sup> especially in circumstances in which several related corporate entities are entitled to claim with respect to the same measure. The ‘cut-off’ point proposed in *Enron*, which hinges on the extent of the state’s consent to arbitration and whether the investor may be deemed to be included in it, has generally not been applied.<sup>128</sup> Schreuer observed this solution is not generally applicable and ‘lacks a legal foundation’, since state consent to arbitration ‘through a treaty or national legislation does not depend on personal contact with a particular investor’.<sup>129</sup> He proposed to achieve coordination of related proceedings through ‘consolidation, *pro rata* awards, a flexible application of *lis pendens* and *res judicata* as well as other methods’.<sup>130</sup> However, no notable developments in this line may be observed in investment tribunals’ jurisprudence. Lowe has in fact referred to the ‘primitive state of international legal doctrine on matters such as *res judicata* and *lis pendens* in the context of arbitration’.<sup>131</sup> For him, the answer lies in the interpretation of the relevant treaties.<sup>132</sup> But legal theory as to how IIA provisions—which have greatly expanded the possibilities for bringing claims<sup>133</sup>—may be applied to bring some certainty in this field appears in a primitive state as well.<sup>134</sup>

Paradoxically, however, positions like the ones expressed in *Enron* and *Sempra*—including the hope that ‘able government negotiators’ will deal with any negative

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<sup>127</sup> See Rivkin (2005) 278 (in arbitration there are ‘no precise guidelines for the critically important issues such as double recovery or double jeopardy’). This is true as regards international law generally. Yet given the *jus standi* principles prevailing in international investment law, the problem is more acute in this field.

<sup>128</sup> But see Schlemmer (2008) 86. Investment tribunals have not denied the possibility of a ‘cut-off’ point. Yet they have refrained both from explaining the conditions for its application and from applying it in specific cases. See *Noble Energy* [80-82]; Zuleta, Saldarriaga and Vohryzek-Griest (2010) 1235; Valasek and Dumbery (2011) 73.

<sup>129</sup> Schreuer (2005) 13.

<sup>130</sup> *Ibid.*, 21. See also Schreuer (1976) 511-512, 526; Hansen (2010) 524, 532, 549-550.

<sup>131</sup> Lowe (2010) 1018.

<sup>132</sup> *Ibid.*

<sup>133</sup> IIAs sometimes protect not only companies themselves and shares, but also ‘other interests in a company or interests in the assets thereof’ (Argentina-US BIT, Art I.1). This opens the door to overlapping claims with respect to injury to the company’s assets. IIAs, however, are generally silent as to how these claims may be coordinated.

<sup>134</sup> The *EDF* tribunal stated that the concerns expressed by the ICJ in *Barcelona Traction* about ‘multiplicity of claims’ are not ‘implicated in a bilateral investment treaty, which by its terms covers only investors of the relevant signatory nation’. *EDF (Jurisdiction)* [170-171]. This statement, however, does not deal with the potential for multiplicity of claims arising from the simultaneous applicability of more than one IIA or from related treaty and contract claims.

consequences, including double recovery, after the investment tribunal has rendered its decision<sup>135</sup>—acknowledge implicitly that there is only one damage (even when the claim was brought by the shareholder invoking its own treaty rights rather than the company invoking contract rights). Or, by the same token, that the damage is the same whether the claim was brought by shareholder A under the IIA between the host country and home country X, or by shareholder B under the IIA between the host country and home country Y.<sup>136</sup>

With this in mind, investment tribunals can better reflect on questions that should be weighed up in considering IIA claims' admissibility. Aside from double recovery, if compensation is granted to the shareholder claimant, are the legitimate interests of the directly affected local company preserved? If not, is this fair in the circumstances? Is it irrelevant for all shareholders which entity in the corporate chain is compensated? Will third parties' legitimate interests be affected because of the fact that the claimant will be compensated, which in turn may affect the ability of the local company or other entities at different levels in the corporate chain to put forward a damages claim?

No general answers can be given, yet recognition that they may affect admissibility is crucial. Under the interpretation of existing IIAs adopted by investment tribunals, including the notions of independence of shareholder rights and treaty claims, in principle such questions do not affect jurisdiction. The few treaty provisions that address overlapping claims remain largely untested.<sup>137</sup> Further, such provisions fail to address some of the roots of the problem. For example, CETA requires waivers of both the claimant and the 'locally established enterprise', when the claim is for loss or damage to the latter or an interest in it.<sup>138</sup> But shareholders typically argue that they claim for their own losses, not those of the company.<sup>139</sup>

The admissibility question arises because IIAs may beget several entitlements over the same damage. The 'cut-off' concept as proposed by the *Enron* tribunal is not

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<sup>135</sup> Other arbitral tribunals have put their faith in subsequent decisions by other (generally local) courts. See e.g. *Chevron* [557].

<sup>136</sup> *Daimler* [154].

<sup>137</sup> But see *Renco* [82-85].

<sup>138</sup> CETA, Art 8.22.

<sup>139</sup> This is often accepted by investment tribunals, at least at the jurisdictional stage. See, e.g., *Noble Energy* [77].

particularly useful, in particular because under IIAs consent to arbitral jurisdiction is not necessarily affected by the claimant's position in the relevant corporate structure. Yet proximity in the structure between the claimant and the entity whose assets were affected is a relevant admissibility consideration. As the number of intermediary entities between the claimant and the directly affected company increases, the likelihood of affecting third parties, who may have claims against or interests in such entities, also increases. On the other hand, the absence of legitimate interests that could be prejudiced by the IIA claim, including those of the local company, is also relevant to admissibility. It is only in this case where investment tribunals' apparently preferred criteria, i.e., whether they are the first tribunal to rule on overlapping claims, should be allowed to play a significant role.

### C Third party interests

Investment tribunals have recognised the principle that certain third parties have priority vis-à-vis shareholders over the company's assets and that third-party interests may be affected by shareholder claims.<sup>140</sup> But these acknowledgements have had little practical impact. The *Hochtief* tribunal, for example, stated it could not assume that the shareholder in an IIA claim has 'an unencumbered right to a share of the reparation due', since '[o]ther shareholders and creditors of [the company] may have claims on sums paid by way of reparation'.<sup>141</sup> However, this was a matter between the claimant and persons not party to the proceedings.<sup>142</sup> Thus, it was not within its 'responsibilities and its powers' to address it.<sup>143</sup> On this party-centric view of arbitration, arbitrators cannot take measures in the interest of third parties.<sup>144</sup> Another view regards investment arbitration as 'a structure of global governance', with 'important effects going beyond those who appear before them in individual disputes'.<sup>145</sup> Here, the situation of non-parties is relevant because investment arbitration's legitimacy depends on the impact of the arbitral decisions on the parties as well as on such non-parties.<sup>146</sup>

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<sup>140</sup> *Pan American* [220]; *Urbaser* (Jurisdiction) [253].

<sup>141</sup> *Hochtief* (Liability) [305]

<sup>142</sup> *Ibid.*

<sup>143</sup> *Ibid* [306]. However, the tribunal ordered the claimant to disclose the arbitral decision to the local company's board. *Ibid.*

<sup>144</sup> Hobér (2005) 249.

<sup>145</sup> Kingsbury and Schill (2009) 1-2.

<sup>146</sup> *Ibid*, 41.

Yet investment tribunals are not prevented from taking into account legitimate interests of third parties, for instance over the relevant assets, in deciding investment disputes.<sup>147</sup> The fact that the potential impact on third-party interests may be considered does not mean that the third parties would be bound by the award. Nor would the merits of third-party claims be the focus of these kinds of considerations. Rather, the possible prejudice to third parties may be factored in as an admissibility ground, not least to the extent the third parties' rights or interests are protected by provisions of the law applicable to the dispute. This admissibility determination would not concern jurisdiction or the ultimate merits of the claim.<sup>148</sup> Investment tribunals have declared damages claims inadmissible on a wide variety of grounds, including that the same damages had been claimed in a parallel arbitration or that it was not the claimant but another entity in the same corporate structure that had incurred the alleged losses.<sup>149</sup>

#### 1 *The company's creditors*

In *CMS*, the tribunal observed that 'in the real world, creditors would require to be paid first, one way or the other, at the expense of the shareholders'.<sup>150</sup> It further noted that, as compared to debtholders, 'shareholders bear a significantly larger risk, because their claims are residual'.<sup>151</sup> Similarly, the *Hochtief* tribunal referred to 'the normal priority of creditors over shareholders'.<sup>152</sup> This is, moreover, consistent with basic financial theory:

The most revolutionary and counter intuitive idea behind firm valuation is the notion that equity investors and lenders to a firm are ultimately partners who supply capital to the firm and share in its success. The primary difference between equity and debt holders in firm valuation models lies in the nature of their cash flow claims – lenders get prior claims to fixed cash flows and equity investors get residual claims to remaining cash flows.<sup>153</sup>

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<sup>147</sup> See *Plama* (Order) [43] (taking into account third party rights in rejecting an application for provisional measures).

<sup>148</sup> See *EDF* (Jurisdiction) [199].

<sup>149</sup> *Orascom* [496-518].

<sup>150</sup> *CMS* (Award) [429].

<sup>151</sup> *Ibid* [454].

<sup>152</sup> *Hochtief* (Liability) [324]. The ICJ in *Diallo* suggested that in the case of liquidation a partner in a company receives 'in due proportion to his capital ownership, the net value of the company's assets'. *Diallo* (Merits), 677.

<sup>153</sup> Damodaran (2012) 252.

Here shareholders and creditors are seen as partners, albeit bearing different risks given that creditors' claims over the company's cash flows are to be satisfied first.

Shareholder indirect claims involve the same assets over which third parties, such as the company's creditors, may also have rights or at least legitimate interests if the company's debts are not paid. Valuation methodologies deduct the company's debts to calculate the shareholder's share of the damages, yet shareholders are paid first. In *Suez I*, which involved a shareholder claim for measures in respect of the local company's public utility contract, the tribunal recognized that debts are satisfied first and then payments to equity are made with any remaining funds.<sup>154</sup> On the other hand, it stated there was no double recovery problem. The local courts not having granted any recovery to the local company, if it

should award damages in this case, it [was] certain that the Argentine government would make the relevant court aware of that fact as well as the waivers that the Claimants [had] expressed as part of the record.<sup>155</sup>

Yet if to avoid double recovery the local court has to deduct from any compensation going to the company amounts already received by shareholders, the company's assets will be reduced accordingly. If the company is unable to satisfy all its debts,<sup>156</sup> the distribution of risks entailed by creditors' priority vis-à-vis shareholders is upset.<sup>157</sup>

Further, while valuation methods arrive at an equity value after deducting expected debt payments (sometimes including payments that should occur years after the valuation date), this is a hypothetical exercise. When adopted by the arbitral award, the result of the exercise determines the amount of the shareholder's compensation. However, debts are subtracted only in theory but are not actually paid. This may not be particularly relevant for market valuations (often applying the same methods as in investment arbitration). For example, if such valuations assume that all the company's debts will be paid and this does not eventuate, the prejudice to creditors will not result from anything the valuator did but from some other factor. But for investment tribunals, that the shareholder may be compensated first and third parties will not only have to wait for other proceedings but may even be prejudiced by the outcome of the investment claim matters;

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<sup>154</sup> *Suez I* (Award) [89]. See also Jiménez de Aréchaga (1965) 77.

<sup>155</sup> *Suez I* (Award) [45].

<sup>156</sup> In *Suez I* the local company entered into liquidation during the pendency of the case. *Suez I* (Liability) [51].

<sup>157</sup> Which is a major issue in insolvency law. See generally Bebchuk (2002); Baird and Bernstein (2006).

not least since creditors' and other third parties' priority over shareholders is often recognised by the national law the investment tribunal must apply. There is no evidence that IIAs intended to derogate from this important principle simply by including shares among protected investments or by protecting indirect interests.

## *2 Other potentially affected third parties*

Aside from creditors, other persons not involved in the arbitration may also be affected by the shareholder indirect IIA claim. First, the company who directly owns the assets harmed by the measures in question is itself generally a third party to the investment arbitration. As discussed above, the upshot of the shareholder receiving compensation is that the company may not be able to be fully compensated through its own claims, given the common assumption by investment tribunals as to related claims to be decided after the shareholder IIA claim. Second, and relatedly, shareholders other than the IIA claimant are also affected when the company is unable to fully repair its losses.<sup>158</sup> Such shareholders' interests are prejudiced to the extent that the outcome of the IIA claim prevents the company from obtaining full reparation. Third, employees and commercial partners may also be affected whenever all or part of the compensation for harm to the company is not received by it but by its shareholders.<sup>159</sup>

In assessing admissibility, distinctions between the potentially affected third parties may be necessary. The relevance of the impact on the company itself (apart from other third parties) varies depending on the extent of the IIA claimant's interest in it. For example, if the local company is a wholly-owned subsidiary of the claimant's group of companies, any potential prejudice to the company stemming from the IIA claim would be less relevant for admissibility purposes. Further, from a legal perspective, the position of shareholders other than the IIA claimant should be considered but cannot be equated to that of creditors.<sup>160</sup> Creditors' priority over shareholders referred to above is not applicable to the relationship between shareholder IIA claims and other claims by different shareholders. Finally, some third parties such as the company's employees may, broadly speaking, be categorized as creditors. But their situation under the applicable laws is not the same as that of other third parties, such as the company's commercial lenders

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<sup>158</sup> See Gami [120].

<sup>159</sup> Müller (2015) 118.

<sup>160</sup> Ibid, 71.

and suppliers. When third parties may be affected, investment tribunals should take these differences into account, which often respond to important societal values. Thus, negative effects on entities related to the claimant in the shareholder IIA claim are less relevant to admissibility than potential prejudice to third parties whose rights may be especially protected under the applicable law such as, for example, workers.<sup>161</sup>

## II. DAMAGES AND THE CAUSE OF ACTION

### A Contract damages and treaty damages?

The concepts of contract claims and treaty claims have become terms of art in investment arbitration.<sup>162</sup> And the distinction between them is often regarded as ‘essential’, denoting ‘different causes of action arising in distinct legal systems’.<sup>163</sup> Yet the consequences of the distinction in terms of damages are underexplored. This is probably related to the uncertainties as to its impact on the substance of investment claims more generally. This thesis argues that differences in the causes of action are irrelevant for purposes of weighing the admissibility consequences of overlapping claims. What matters is whether the IIA claim involves the same loss as other actual or potential (national or international) claims.<sup>164</sup> Further, although the contract/treaty distinction is largely based on the law under which the claims arise or that is applicable to them<sup>165</sup>—i.e., international law to treaty claims and national law to contract claims—national law usually plays at least some role in the resolution of treaty claims. This role includes sometimes being the source of rights invoked by investors, either directly or indirectly through the concept of legitimate expectations or similar ideas.<sup>166</sup>

But as to quantum, what is the relationship between the contract/treaty distinction, on the one hand, and the damages that may be claimed under each head, on the other? In the *Reparation for Injuries* advisory opinion, the ICJ considered the case of parallel claims for the same damage but on different bases. The General Assembly asked, first, about the United Nations’ capacity to bring an international claim in the event one of its

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<sup>161</sup> Worker rights are sometimes recognized by IIAs themselves. See Argentina-US BIT, Preamble [5].

<sup>162</sup> Sinclair (2013) 7.

<sup>163</sup> Ibid. See also Siwy (2017) 220.

<sup>164</sup> Cf *Gardner v Parker*; Gaukrodger (2013) 18.

<sup>165</sup> See Chapter 6.

<sup>166</sup> See *Parkerings* [330].

agents suffered injury while performing her functions.<sup>167</sup> Second, if this capacity was found to exist, then the question was how was ‘action by the United Nations to be reconciled with such rights as may be possessed by the State of which the victim is a national’.<sup>168</sup> The Court answered the first question in the affirmative.<sup>169</sup> As to the second question, the ICJ observed that ‘competition between the State’s right of diplomatic protection and the Organization’s right of functional protection might arise’, there being ‘no rule of law which assigns priority to the one or to the other’.<sup>170</sup> The Court suggested, nonetheless, this competition could be resolved through the ‘good will and common sense’ of the parties concerned and eventually by a general convention or *ad hoc* agreements.<sup>171</sup> The ICJ also stated:

Although the bases of the two claims are different, that does not mean that the defendant State can be compelled to pay the reparation due in respect of the damage twice over. International tribunals are already familiar with the problem of a claim in which two or more national States are interested, and they know how to protect the defendant State in such a case.<sup>172</sup>

The Court appeared to treat the necessary ‘reconciling’ of overlapping rights as going to the ‘admissibility of the claim’.<sup>173</sup> This is consistent with the approach proposed in this thesis, although it has so far not been generally adopted in investment arbitration.<sup>174</sup>

In preliminary decisions, investment tribunals have recognized the possibility of overlaps between damages claimed in contract and treaty claims, albeit generally observing jurisdiction is not affected.<sup>175</sup> In *Azurix*, the tribunal appreciated the concern that a foreign shareholder may be able to recover twice, through an investment arbitration and through national proceedings brought by the local subsidiary.<sup>176</sup> It noted, however,

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<sup>167</sup> *Reparation for Injuries*, 175.

<sup>168</sup> *Ibid.*

<sup>169</sup> *Ibid.*, 180.

<sup>170</sup> *Ibid.*, 185.

<sup>171</sup> *Ibid.*, 186.

<sup>172</sup> *Ibid.*

<sup>173</sup> *Ibid.*, 186.

<sup>174</sup> But see *Orascom* [495].

<sup>175</sup> See *Sempra* (Jurisdiction) [102].

<sup>176</sup> *Azurix* (Jurisdiction) [101].



that ‘any compensation awarded must be based on the actual loss a claimant is able to show’.<sup>177</sup>

In *EDF*, the tribunal noted in its jurisdictional decision that ‘a loss engendered by a treaty breach may overlap with the damages caused by the contract violation’.<sup>178</sup> And that to the extent local judicial processes result in the claimants being compensated for their loss, recovery under IIAs ‘would likely be barred’.<sup>179</sup> Local judicial proceedings had been brought by the local company under a contract.<sup>180</sup> Several of these national claims, which referred to measures also involved in the treaty arbitration, were eventually settled by the company through an agreement with the local government.<sup>181</sup> In the award, the tribunal acknowledged ‘possible overlaps’ but concluded that they did not constitute double recovery.<sup>182</sup> The relevant reasoning includes a reference to the damages being granted in the arbitration for ‘treaty breach’.<sup>183</sup> But the tribunal based its conclusion on its understanding that any benefits resulting from the settlement agreement had either been received after the claimants had sold their investment or already been deducted from the damages calculations.<sup>184</sup>

In other cases, however, the contract/treaty distinction had a more significant impact on the approach to damages. In the *Bayindir* case, which concerned a contract for the construction of a motorway,<sup>185</sup> the tribunal posited that ‘when the investor has a right under both the contract and the treaty, it has a self-standing right to pursue the remedy accorded by the treaty’.<sup>186</sup> Even when ‘the amount claimed under the treaty is the same as the amount that could be claimed (or was claimed) under the contract’, this ‘self-standing right’ is not affected.<sup>187</sup> Likewise, the tribunal in *Alemanni* asserted that although in treaty claims ‘remedies appropriate to a breach of treaty’ apply, that the remedy the

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<sup>177</sup> Ibid.

<sup>178</sup> *EDF* (Jurisdiction) [219].

<sup>179</sup> Ibid [220].

<sup>180</sup> *EDF* (Award) [1133-1134].

<sup>181</sup> Ibid [1137-1139].

<sup>182</sup> Ibid [1142-1143].

<sup>183</sup> Ibid [1142].

<sup>184</sup> Ibid [1142-1143].

<sup>185</sup> *Bayindir* (Jurisdiction) [10-20].

<sup>186</sup> Ibid [167].

<sup>187</sup> Ibid.

claimant seeks is in the respondent's view one 'of the same kind as that which [the claimant] might seek in a domestic court under a contract claim, is neither here nor there'.<sup>188</sup> These statements were made at the jurisdictional stage. Yet, the tribunal in *Saur* adopted a similar approach at the quantum phase. It found that a claim related to a management fee for the technical operation of a concession contract was not a contract claim, but rather a claim for compensation for the injury caused to the investment (which included the rights as technical operator).<sup>189</sup> Thus, it was a treaty claim. Still, the damages in respect of this claim were found to be 'equivalent to the value of the benefits' that the claimant was 'prevented from obtaining under the [contract]'.<sup>190</sup>

Calculating damages relating to a contract based on the benefits the claimant would have received under the contract but for the challenged measure is uncontroversial. The Iran-US Claims Tribunal in the *Phillips Petroleum* case observed that the determination of the fair market value of revenue-producing assets, including contract rights, 'must involve a careful and realistic appraisal of the revenue producing potential of the asset over the duration of its term'.<sup>191</sup> As regards contracts, the ILC also observed 'it is the future income stream which is compensated, up to the time when the legal recognition of entitlement ends'.<sup>192</sup> The ILC itself, however, referred in particular to 'the risk of double-counting which arises from the relationship between the capital value of an enterprise and its contractually based profits'.<sup>193</sup> If properly applied, valuation methods should not yield this result. As explained above, equity or firm valuation is based on the cash flows expected under the company's contracts, but these flows will not be counted twice. Yet the ILC's warning highlights that the valuation of a company or of shareholder equity, on the one hand, and of a contract, on the other, will frequently involve the same asset (i.e., the cash flows under the contract).

This overlap as to damages arises because treaty claims are often substantively based on contractual rights.<sup>194</sup> Damages for the two types of claims frequently overlap.

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<sup>188</sup> *Alemanni* [300].

<sup>189</sup> *Saur* (Award) [337].

<sup>190</sup> *Ibid* [350]. Author's translation (original French). See also *Total* (Liability) [460].

<sup>191</sup> *Phillips Petroleum* [111].

<sup>192</sup> ILC Commentaries, 105.

<sup>193</sup> *Ibid* [26].

<sup>194</sup> See e.g. *Enron* (Award) [166] (treaty claim concerned 'the breach of the various aspects of the tariff system' and investor rights 'in light of the legal, regulatory and contractual commitments made').

Certain modern valuation techniques, such as the DCF method described above, have contributed to this overlap or at least made it less visible, to the extent they are based on the cash flows an asset may generate rather than on the asset's book value or similar concepts. While the position is not always clear,<sup>195</sup> some investment tribunals have not only acknowledged the risk of double recovery between contract and treaty claims<sup>196</sup> but also adopted measures attempting to avoid this risk.<sup>197</sup> The tribunal of *Venezuela Holdings* had to deal with a related arbitration under the arbitral rules of the International Chamber of Commerce (ICC). The ICC arbitration concerned 'the liability of different parties under different normative regimes', i.e., it was a contractual dispute that did not refer to Venezuela's responsibility under international law.<sup>198</sup> Still, the tribunal recognized a certain degree of overlap between the ICSID and the ICC proceedings,<sup>199</sup> including in particular some of the questioned measures.<sup>200</sup> Thus, the tribunal adopted dispositions to seek to avoid both inconsistent outcomes and double recovery, including deducting from the IIA compensation sums that had already been received under the ICC award.<sup>201</sup> This way of proceeding is often fraught with difficulties stemming, for example, from privity issues, in that the party who was compensated in the non-IIA claim may be related but not be the same as the IIA claimant. Yet these difficulties should not prevent investment tribunals from recognizing that contract and treaty claims—whatever the distinction's virtues—often involve the same damages.

## B Claims for the same damage before different jurisdictions

Essentially because of the contract-treaty distinction and the wide definition of investments and investors in IIAs, the same damages may be involved in parallel claims before a contract and a treaty jurisdiction or before different treaty jurisdictions.<sup>202</sup> However, despite calls for a 'flexible application of *lis pendens* and *res judicata*',<sup>203</sup>

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<sup>195</sup> See *Total* (Award) [189] (for a damages decision apparently denying the overlap between contract and treaty claims, at least for certain purposes).

<sup>196</sup> *Goetz II* [211]; *Hochtief* (Jurisdiction) [121-122].

<sup>197</sup> See e.g. *Railroad* [267].

<sup>198</sup> *Venezuela Holdings* [216].

<sup>199</sup> *Venezuela Holdings* (Annulment) [148].

<sup>200</sup> *Venezuela Holdings* [119, 217].

<sup>201</sup> *Ibid* [217, 271, 378-381].

<sup>202</sup> Reinisch (2010) 119; Yannaca-Small (2008) 1009-1010.

<sup>203</sup> Schreuer (2005) 21; Reinisch (2010) 121-123.

investment tribunals have been strict in the application of these concepts. In the *CME* and *Lauder* cases against the Czech Republic, notorious for arriving at conflicting findings on factually overlapping claims,<sup>204</sup> both tribunals took similar views on these ideas. In discussing the issue of the same remedies before different fora, the *Lauder* tribunal deemed the *lis pendens* principle inapplicable because the related proceedings did not involve the same parties and causes of action.<sup>205</sup> That such other proceedings involved claimants related to the claimant in *Lauder* and the same facts (albeit claims under another BIT or national law) did not change the analysis.<sup>206</sup> The *CME* tribunal observed that for *res judicata* purposes the same dispute is involved only when there is identity in terms of the parties, subject matter, and cause of action.<sup>207</sup> Thus, the principle of *res judicata* could not apply to the *Lauder* award in spite of the claimant's ultimate parent company being controlled by Mr Lauder.<sup>208</sup>

Both tribunals strongly relied on formal differences as to the identity of the parties and the causes of action in the different proceedings. The *Lauder* tribunal advanced that seeking the same remedies before different tribunals did not affect jurisdiction.<sup>209</sup> Yet both tribunals also appeared to acknowledge the risk of double recovery and suggested the same solution. While denying the risk of contradictory decisions in the facts of the case, the award in *Lauder* concluded that the only remaining risk was that 'damages be concurrently granted by more than one court or arbitral tribunal, in which case the amount of damages granted by the second deciding court or arbitral tribunal could take this fact into consideration when assessing the final damage'.<sup>210</sup> In *CME*, the tribunal noted that the national proceedings had not yet provided any relief to the claimant and the prospects of the local claimants being compensated were low.<sup>211</sup> Less forcefully than the *Lauder* tribunal, however, the *CME* tribunal observed that, when resolving the dispute between

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<sup>204</sup> Söderlund (2005) 318.

<sup>205</sup> *Lauder* [171].

<sup>206</sup> *Ibid* [156-175].

<sup>207</sup> *CME* (Final Award) [435].

<sup>208</sup> *Ibid* [436-437].

<sup>209</sup> *Lauder* [175].

<sup>210</sup> *Ibid* [172].

<sup>211</sup> *CME* (Final Award) [489].

the parties to the national proceedings, the local courts ‘may or may not consider payments’ by the host state pursuant to an arbitral award.<sup>212</sup>

Several investment tribunals have endorsed the idea that any risk of double recovery arising from an investment arbitration and local proceedings, involving similar facts, can be resolved by the tribunal deciding later. The tribunal in *Impregilo* opined that ‘[t]he question of double compensation being granted would seem to the Arbitral Tribunal to be a theoretical rather than a real practical problem’.<sup>213</sup> If compensation were granted to the company at the domestic level, treaty claims by the foreign investor would be affected and vice versa.<sup>214</sup> With reference to the same local proceedings, in the jurisdictional decision the *Urbaser* tribunal cited this finding in *Impregilo* with approval, adding that the issue would, if necessary, be considered at the merits phase.<sup>215</sup> Thus, investment tribunals believe that the risk of double compensation does not affect their jurisdiction and pertains to the quantum debate.<sup>216</sup> The issue here generally refers to the possibility of compensation being granted by a national court after the arbitration is over. The *Saur* tribunal asserted that if the claimant were to be compensated in local proceedings—in the case, the local company’s liquidation proceedings—before the award was issued, any amount received ‘should be deducted from the compensation owed under this proceeding, to avoid an unjust enrichment’.<sup>217</sup>

The tribunal in *Gami*, however, appeared less enthusiastic about the prospects of coordination between investment tribunals and local courts as to overlapping claims. It stated there was ‘no *procedural* basis on which such coordination could take place’<sup>218</sup> and no rationale on which payment to the foreign investor could be reduced to account for the payment of compensation to the local company in national proceedings.<sup>219</sup> In contrast with other investment tribunals, moreover, the *Gami* tribunal expressed doubts as to the national courts’ ability to reduce the local company’s recovery because of the payment

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<sup>212</sup> Ibid [489].

<sup>213</sup> *Impregilo* [139].

<sup>214</sup> Ibid.

<sup>215</sup> *Urbaser* [253].

<sup>216</sup> *Daimler* [154].

<sup>217</sup> *Saur* (Liability) [207]. Author’s translation (original Spanish).

<sup>218</sup> *Gami* [117].

<sup>219</sup> Ibid [118].

received by a shareholder in an investment arbitration.<sup>220</sup> The local company, as the owner of the affected asset, and its creditors would have priority vis-à-vis the shareholder bringing the treaty claim, in respect of any compensation. Further, the rest of the local company's shareholders had 'an equal right to the distribution'.<sup>221</sup> In the end, for the *Gami* tribunal '[t]he overwhelming *implausibility* of a simultaneous resolution of the problem by national and international jurisdictions impels consideration of the practically *certain* scenario of unsynchronised resolution'.<sup>222</sup>

The often-recognized potential for double compensation between contract and treaty proceedings, or between proceedings under different IIAs, implies acknowledging that the same loss may be involved in two or more proceedings,<sup>223</sup> despite differences in the identity of the claimants or in the causes of action. Yet, investment tribunals have limited themselves to observing that the court deciding after them (alluding to a national court) could consider whatever compensation is granted under the IIA. Hence, the risk of double compensation is supposed to disappear. In practice, this has meant that investment tribunals have largely ignored the problem.<sup>224</sup>

This outcome is problematic. As noted by the *Gami* tribunal, there may be legal obstacles for the local court to deduct the compensation ordered in the treaty proceeding from any payment to which the local company is entitled. The obstacles, which may relate not only to the company's rights but also to third-party rights, mostly depend on the contents of the host state's law. Investment tribunals should, first, seek to determine the real ability of national courts under the relevant national law to deduct the compensation already received by the shareholder (which apparently has never been done), not least because the host state's law is often part of the applicable law. Second, having determined whether local courts will be able to factor in any compensation granted to the shareholder and whether doing so may affect legitimate interests, they should decide the shareholder indirect claim's admissibility. Simply observing that compensation has not been paid yet

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<sup>220</sup> Ibid [120].

<sup>221</sup> Ibid.

<sup>222</sup> Ibid [119].

<sup>223</sup> Yannaca-Small (2008) 1012.

<sup>224</sup> It is only as regards separate proceedings under different IIAs involving the same damage that a few investment tribunals have recently found one of the overlapping claims inadmissible or an abuse of process. See *Ampal* (Jurisdiction) [330-331]; *Orascom* [495]. But the same is not true as regards overlapping IIA and national proceedings.

is insufficient, in part because whether the compensation goes to the shareholders or to the company affects third parties. While shareholders are often able to choose which proceeding will finish first (and perhaps later abandon or even not pursue one or more of the possible claims), other parties typically do not have that choice.

It is not suggested here that the prospects of recovery before local courts, for instance, is irrelevant. But given the importance of other interests that may be at play, the conclusion that local courts will not grant adequate reparation should not be reached lightly. Other potential solutions, such as waivers by the treaty claimant of other claims, should also be weighed carefully, including realistically assessing their possible effect under national law before local courts. Further, the prospects of recovery before other fora should not be the only consideration. There are other rational bases on which the admissibility of treaty claims overlapping with other claims may be considered, including some of the ones identified by the *Gami* tribunal such as creditors' priority.<sup>225</sup>

### III. CONCLUSION

In the field of damages, investment tribunals have sometimes taken a more flexible approach towards the substance of the claims than when dealing with jurisdictional or liability aspects. In particular, several decisions suggest that possible overlaps between national and international claims (or between claims under different IIAs), while otherwise largely irrelevant due to the different parties and causes of action involved, may be taken into account in the quantum phase. The overriding consideration has been avoiding double recovery for the same damage. Yet the impact on damages of the distinctions between shareholder standing and that of the company, and between contract and treaty claims, remains somewhat unclear.

Most tribunals have refrained from asserting that shareholders can claim directly for losses caused to the company's assets (although some have allowed shareholders to claim in relation to 'an indirect interest' in the company's rights).<sup>226</sup> But even those tribunals expressly denying this possibility have upheld shareholder claims in respect of treatment of the company's assets, 'to the extent that those claims are related to the effects

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<sup>225</sup> The *Gami* tribunal attributed the complexities involved in parallel national and international proceedings to the 'derivative nature' of the claim and concluded it was 'necessary to revert to basic propositions'. Ibid [121]. The problems deriving from 'unsynchronized resolution' between national and international jurisdictions were thus left for another day.

<sup>226</sup> *Suez ARB/03/17* (Liability) [119]; *Suez ARB/03/19* (Liability) [130].

that the measures taken against the company's assets have on the value of the claimant's shares in such company'.<sup>227</sup>

This may be a distinction without a difference, however. Indeed, the effect on the value of the claimant's shares is nowadays often calculated based on the challenged measure's impact on what is often the company's most valuable asset, i.e., its future cash flows. Further, investment tribunals seem to admit that the conceptual distinction between contract and treaty claims does not exclude possible double recovery in the event the two types of claims are being pursued before different fora. Still, these tribunals have not only failed to adequately engage with this possibility, leaving it for a subsequent tribunal to resolve, but have also omitted consideration of other implications of shareholder claims under IIAs.

Neither firmly entrenched ideas on shareholders' 'independent right of action' and the treaty nature of most investment claims nor the application of modern valuation techniques can obscure that there is often only one damage involved. This is so even if, apart from the local company directly affected, there are many legal entities of the same corporate chain with standing to sue (under the same or different IIAs). And, relatedly, that there may be only one affected asset—no matter how many persons may have IIA protected rights/interests over it.

The position of third parties may be affected by whether compensation is received by the company or a shareholder. Their claims against the company, even if theoretically accounted for in the damages calculations, may not be paid before the shareholder is compensated. In addition, if the damage is the same under related treaty and contract claims, the impact of contractual forum selection clauses—largely ignored for assessing jurisdiction over treaty claims—may have to be revisited at the quantum phase. It may be one among several relevant factors that the parties to the contract agreed that the damages in question would be considered by the contractual forum.<sup>228</sup>

These considerations concerning standing and cause of action do not pertain to the merits of damages claims but rather to their admissibility (in whole or in part).<sup>229</sup> International tribunals such as the Iran-US Claims Tribunal have repeatedly recognized

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<sup>227</sup> *Poštová Banka* [232]. See also *ST-AD* [284-285]; Ripinsky and Williams (2008) 155, 160-161.

<sup>228</sup> See McLachlan (2008) 406; *Malicorp* (Award) [103].

<sup>229</sup> *Reparation for Injuries*, 186. But see *Hochtief* (Liability) [180].



that damages determinations ‘must take into account all relevant circumstances, including equitable considerations’.<sup>230</sup> Investment tribunals have endorsed ideas that they enjoy ‘a high level of discretion’<sup>231</sup> in setting compensation and that ‘general equitable principles’ may be considered.<sup>232</sup>

Relevant here is that in the exercise of this discretion several tribunals have ordered the transfer of investment assets to the respondent state conditional on payment of the award, mainly to avoid double recovery risks.<sup>233</sup> This and other possible solutions may not solve all the problems of shareholder indirect claims under IIAs. Yet they evince a recognition of one of the main causes of these problems, i.e., that often the same damage is involved in parallel contract and treaty claims (or between parallel treaty claims, for that matter). Admissibility allows investment tribunals to effectively address duplication of damages claims, rather than simply hoping that someone will solve the problem later. At the same time, admissibility avoids a decision on (if not the trial of) the ultimate merits of inadmissible claims. This is desirable in terms of judicial economy and preventing inconsistent decisions.

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<sup>230</sup> *Phillips Petroleum* [112]. See also Wälde and Sabahi (2008) 1061; *AMT* [7.21]; *Gold Reserve* [686]

<sup>231</sup> *Impregilo* (Annulment) [160]. As to interest see *Yukos* (Award) [1658].

<sup>232</sup> *Tecmed* [190]; *Total* (Award) [32]; *Gold Reserve* [686]. See also Ripinsky and Williams (2008) 124; Wälde and Sabahi (2008) 1104.

<sup>233</sup> *Railroad* [263-265]; *Tecmed* [199]; *AAPL* [111]; *CMS* (Award) [469]; *ADC* [523].

## 6 *The Contract-Treaty Distinction*

[I]n the face of absolute equity the trick of making the same contract a chain for one party and a screw press for the other never can have success...<sup>1</sup>

International tribunals have struggled for well over a century to describe the relationship between international law and contracts. Aside from the mixed claims commissions cases, more recent instances of this debate include the big oil arbitrations of the 1950s, 60s and 70s. A recurrent theme in these arbitrations was what the law applicable to contracts concluded by the state with a foreign entity was. Since Lord Asquith in *Petroleum Development* identified the law of Abu Dhabi as potentially relevant but notoriously failed to apply it,<sup>2</sup> some of these *ad hoc* international tribunals regarded national law as the law governing such contracts,<sup>3</sup> albeit generally in conjunction with general principles of law or international law.<sup>4</sup> The applicability of the law of the contracting state resulted from express choice of law provisions in the contracts and general notions of private international law.<sup>5</sup> As to general principles of law and international law, their application also stemmed from different choice of law provisions or even from alleged implied agreements by the contractual parties relating to the need to protect the private contractor from adverse changes in the relevant national law.<sup>6</sup> However, a general theory on the interaction between national and international law in the context of contracts between states and foreign companies did not emerge from these cases.<sup>7</sup>

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<sup>1</sup> *Orinoco Steamship Company* (Barge, Umpire), 199.

<sup>2</sup> *Petroleum Development (Abu Dhabi)*, 149 ('If any municipal system of law were applicable, it would *prima facie* be that of Abu Dhabi. But no such law can reasonably be said to exist'). This view was based on the alleged underdeveloped status of the law of developing states, which had to be replaced by international law and the law of a civilized state to resolve disputes involving a foreign company. See Anghie (2004) 226-228 (discussing McNair's 1957 article on general principles of law).

<sup>3</sup> But see *Ruler of Qatar*, 545; *Sapphire*, 173.

<sup>4</sup> See e.g. *Aramco*, 165, 169; *Aminoil* [10]; *Texaco*, 438.

<sup>5</sup> Leben (2003) 221-232.

<sup>6</sup> *Ibid*; Voss (2011) 48.

<sup>7</sup> Sinclair (2013) 227; Ho Qing Ying (2014) 2. Jessup developed the transnational law concept to refer to a field of law characterized by constant interaction of state and non-state actors and international, contractual, and national law rules. See generally Jessup (1956). See also Steiner and Vagts (1986); Salacuse (2010) 407 (international investment law is a 'vital part of transnational law').

Certain salient features of the arbitrations referred to in the previous paragraph may be contrasted with present-day investment arbitration. First, the jurisdiction of the former derived either directly from the contract from which the dispute arose or from an arbitration agreement concluded between the foreign company and the state in question.<sup>8</sup> While there are still a number of cases in modern investment arbitration where jurisdiction is based on a contract,<sup>9</sup> nowadays investment tribunals' jurisdiction is frequently treaty-based.<sup>10</sup> Second, the *ad hoc* tribunals of the 1950s-70s often described the agreements in question as 'international contracts',<sup>11</sup> 'international development contracts',<sup>12</sup> or having a 'quasi-international character',<sup>13</sup> due to the presence of one or more international elements in the contract (such as a foreign party, a choice of law provision calling expressly or impliedly for the application of international law, or an international arbitration clause).<sup>14</sup> Although contracts containing express international features are sometimes involved in investment arbitration, modern cases discussing the contract-treaty distinction often involve a contract that has, at least formally, a 'national' character.<sup>15</sup> Finally, while the big oil arbitrations were mostly concerned with the relationship between contracts and general principles of international law,<sup>16</sup> investment tribunals more often deal with the interaction between contractual provisions and a specific treaty or treaties.

The contract claims/treaty claims distinction relates not only to the relationship between contracts and treaties; more specifically, it seeks to distinguish between contractual and treaty causes of action, to delimit the scope of the 'treaty' tribunal's

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<sup>8</sup> *Petroleum Development (Abu Dhabi)*, 145; *Ruler of Qatar*, 534; *Aramco*, 130; *Sapphire*, 140-142; *BP*, 302; *Texaco*, 397; *Liamco*, 73-76; *Aminoil*, xxiv.

<sup>9</sup> In the case of ICSID arbitration, the basis of consent is an 'Investment Contract between the Investor and the Host-State' in 16.7% of the cases. ICSID Statistics (2017-1) 10.

<sup>10</sup> See Leben (2003) 314; Parra (2008) 3; Paulsson (2016) 86.

<sup>11</sup> *Texaco*, 438.

<sup>12</sup> *Liamco*, 56.

<sup>13</sup> *Sapphire*, 173. See also Friedmann (1962) 1158 (using the expression 'quasi treaties').

<sup>14</sup> Miles observed that 'the doctrine of the internationalised contract' may be seen as an example of a practice 'that advances the interests of foreign investors'. Miles (2013) 82. The theory of 'internationalised' contracts seems to have been largely abandoned in current international law thinking. See Douglas (2014) 389. But see Arato (2016) 12.

<sup>15</sup> For example, contracts concluded between the state and a local company (who may have foreign shareholders), subject to national law and jurisdiction.

<sup>16</sup> See, e.g., the discussion in *Texaco* on '[t]he present state of international law and the resolutions concerning natural resources and wealth adopted by the United Nations'. *Texaco*, 483-495.

jurisdiction vis-à-vis that of the ‘contract’ tribunal. The position of contract-based causes of action in international law is complex. In 1961, Jennings referred to ‘the absence in international law of what might be called a “form of action” in contract’.<sup>17</sup> The complexities involved are illustrated by some of the debates that surfaced in the big oil arbitrations: what is the status of contracts in international law? What is the law applicable to a contract claim before an international tribunal? How do the potentially applicable sources of law combine? The jurisdictional position, however, appears settled at least in one respect. The fact that the jurisdiction of an international tribunal may—depending on the relevant provisions—extend to merely contractual disputes is ‘accepted as axiomatic in the literature’.<sup>18</sup>

This chapter argues that notwithstanding the distinction between contract and treaty claims, the two kinds of claims often overlap both substantively and substantially. Thus, the idea of independence of treaty claims is by and large misleading beyond purely jurisdictional determinations. The overlap may affect the admissibility of treaty claims (as well as the merits) to the extent they involve the same damages as related contract claims. Risks of double recovery for the same loss arising from overlapping national proceedings were traditionally taken into account by international tribunals, even if the latter saw themselves as having primacy over local courts.<sup>19</sup> On the other hand, as discussed in Chapter 5, if recovery through a treaty claim prevents or reduces recovery in the contract claims, third parties may be harmed. Neither the application of the contract claims/treaty claims distinction and related ideas nor that of treaty provisions, such as umbrella clauses, should obscure these risks. Further, when treaty claims derive in whole or in part from contractual breaches, not only the IIA provisions but also all the provisions of the contract, including forum selection provisions, and the conduct of both parties to the contract have to be considered in addressing such risks.

This chapter first considers the cause of action in modern investment law, including the distinction between contract and treaty breaches and the idea of the ‘fundamental basis of the claim’. It then discusses aspects of the jurisdiction/admissibility

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<sup>17</sup> Jennings (1961) 164. He added, however, that this ‘[did] not necessarily mean that there [was] no remedy which relate[d] directly to the terms of the contract’. Ibid.

<sup>18</sup> *SGS v Philippines*, 10. But see Sinclair (2013) 90.

<sup>19</sup> See Voss (2011) 303-305; Chapter 3.

distinction relevant to the contract/treaty dichotomy. Finally, it analyses specific instances of interaction between treaties and contracts in investment arbitration.

## I THE CAUSE OF ACTION IN INTERNATIONAL INVESTMENT LAW

Which ‘philosopher’s stone’ turns a contract breach by a state into a treaty breach? The traditional position that a ‘mere’ contract breach is not enough and that something more is required<sup>20</sup> has prevailed in investment arbitration. But beyond this basic point the position is less clear, not least as to what are the precise criteria to distinguish between contract and treaty breaches. The distinction is the basis for another fundamental distinction in international investment law, i.e., that between contract and treaty claims. The distinctions between contract and treaty breach and contract and treaty claims are intimately related. This section will analyse both distinctions in turn. They have evolved separately in international law and have similar but not identical rationales. The main interest here lies in the substantive links between contract claims and treaty claims arising from contract breaches.

### A Breach of contract and breach of treaty

The discussion as to whether the breach by a state of a contract which it has concluded, either directly or through an agent, with a foreigner constitutes a breach of international law has a long history.<sup>21</sup> Schwebel described two extreme positions. On the one hand, the position advanced for example by Greece in *Ambatielos* and by Switzerland in *Losinger & Co.* that a state breach of a contract with a foreigner is without more a breach of international law.<sup>22</sup> On the other hand is the position that such breach does not contravene international law, ‘at any rate if the contract is governed by the law of the contracting State’.<sup>23</sup> Finally, there is a ‘median position’, which Schwebel attributes to the British Government and to Fitzmaurice.<sup>24</sup> Fitzmaurice explained that, absent a denial of justice,

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<sup>20</sup> Weil (1961) 133. Weil described the majority view as stating that ‘the contractual responsibility of the State derives from elements that are external to the contract, which themselves constitute international delicts’. Ibid. Author’s translation (original French). See also Schwebel (1987-II) 111; McLachlan (2008) 417; Voss (2011) 174; von Walter (2015) 84; Siwy (2017) 212.

<sup>21</sup> Schwebel (1987) 401.

<sup>22</sup> Ibid, 403.

<sup>23</sup> Ibid, 404 (footnote omitted).

<sup>24</sup> Ibid, 402-403.

there could be no breach of international law arising from a breach of a contract between a national and a foreigner.<sup>25</sup> He added:

It may be slightly less obvious that there is no breach of international law arising from the breach of contract *per se*, where the contract is between the local *government* and a foreigner, and where a breach on the part of the government is alleged; but, [...] '[i]t is generally accepted that, so long as it affords remedies in its Courts, a State is only directly responsible, on the international plane, for acts involving breaches of contract, where the breach is not a simple breach [...] but involves an obviously arbitrary or tortious element, e.g. a confiscatory breach of contract-where the true basis of the international claim is the confiscation, rather than the breach *per se*.'<sup>26</sup>

According to Schwebel, the median position was the most authoritative<sup>27</sup> because a contract between a state and a foreigner was not an international law instrument and did not create international law obligations.<sup>28</sup> However, 'the use of the sovereign authority of a State, contrary to the expectations of the parties, to abrogate or violate a contract with an alien, [was] a violation of international law'.<sup>29</sup>

The idea that a breach of contract does not *ipso facto* constitute a breach of international law has been accepted by most investment tribunals. For the tribunal in *Noble Ventures*, the rule is well established.<sup>30</sup> It 'derives from the clear distinction between municipal law on the one hand and international law on the other, two separate legal systems (or orders)'.<sup>31</sup> The *Noble Ventures* tribunal observed further that

inasmuch as a breach of contract at the municipal level creates at the same time the violation of one of the principles existing either in customary international law or in treaty law applicable between the host State and the State of the nationality of the investor, it will give rise to the international responsibility of the host State. But that responsibility will co-exist with the responsibility created in municipal law and each of them will remain valid independently of the other.<sup>32</sup>

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<sup>25</sup> Fitzmaurice (1961) 64.

<sup>26</sup> Ibid.

<sup>27</sup> Schwebel (1987-II) 111.

<sup>28</sup> Schwebel (1987) 406. See also *Fifth report on State responsibility* (Ago) [15].

<sup>29</sup> Schwebel (1987) 409. See also Siwy (2017) 212.

<sup>30</sup> *Noble Ventures* [53]. See also *ADF* [190]; *SGS v Pakistan* [167]; *SGS v Philippines* [122]; *Consortium RFCC* (Award) [48]; *Impregilo v Argentina* [177].

<sup>31</sup> *Noble Ventures* [53].

<sup>32</sup> Ibid.

For the concept of independence between breach of contract and breach of treaty, the tribunal relied on article 3 of the ILC Articles<sup>33</sup> as well as on Schwebel's position.<sup>34</sup> Similarly, according to McLachlan the starting-point in distinguishing the two kinds of breaches is that 'rights created by treaty exist on the plane of international law'.<sup>35</sup>

Yet even leaving aside here the special position of national law in investment arbitration, it should be noted that the ILC's commentaries to article 3 do not exclude the possibility that a breach of national law may be relevant for determining whether a breach of international law has occurred. In this respect, the ILC quotes the decision in *ELSI* where the Chamber, while recognizing the general principle that unlawfulness under international law 'does not necessarily mean' unlawfulness under national law, also noted that '[a] finding of the local courts that an act was unlawful may well be relevant to an argument that it was also arbitrary [under international law]'.<sup>36</sup> The qualification given to an act under national law may be 'a valuable indication' for international law.<sup>37</sup> Further, the ILC noted that compliance with internal law may be 'relevant to the question of international responsibility', although this is so whenever 'the rule of international law makes it relevant'.<sup>38</sup>

That national law may be relevant to international responsibility appears as true in investment arbitration as it is in general international law, as recognized by the first *Vivendi* annulment committee.<sup>39</sup> In international investment law, examples of this are IIA provisions requiring conformity with the host state law for purposes of the definition of protected investments or the application of treaty standards of protection.<sup>40</sup> Thus, a breach of contract may not be wholly independent from a breach of treaty in international investment law,<sup>41</sup> at least in the sense that establishing the former breach may be relevant

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<sup>33</sup> Article 3 states: "The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law." ILC Articles, 36.

<sup>34</sup> *Noble Ventures* [53].

<sup>35</sup> McLachlan (2008) 389. See also Cremades and Cairns (2005) 12.

<sup>36</sup> *ELSI* [124].

<sup>37</sup> *Ibid.*

<sup>38</sup> ILC Commentaries, 38.

<sup>39</sup> *Vivendi I Annulment* [101].

<sup>40</sup> See e.g. *Fraport* (Award) [281-283].

<sup>41</sup> But see Sinclair (2013) 13.

in establishing the latter.<sup>42</sup> Investment tribunals acknowledge that contract matters may be a necessary element in treaty claims.<sup>43</sup> Further, Jennings observed that whether a breach of contract amounts to a violation of international law may depend on several factors, including ‘the nature of the contract itself and the terms in which it is drafted’.<sup>44</sup> If the contract terms could be relevant in international claims even at a time when ‘the protecting State’—who was not a party to the contract—was ‘a necessary element in the law’,<sup>45</sup> this applies even more so in investment arbitration where, first, the party to the contract or a related entity directly brings the international claim. Second, regarding the breach of IIA standards of protection, not least under the fair and equitable treatment standard, investment tribunals often rely on the contract’s terms as reflecting the claimant’s expectations.<sup>46</sup> Here, the contract terms form the investor’s legitimate expectations and thus a breach of the former amounts to a breach of the latter. In turn, investment tribunals regard legitimate expectations as tied to the fair and equitable treatment standard.<sup>47</sup> In cases applying this or similar rationales, while conceptually a distinction between contract and treaty breach can still be maintained, there is a substantive link between the breach of the contract terms and those of the treaty.

## B The distinction between contract and treaty claims

There is no dispute that the annulment decision in the first *Vivendi* case laid the modern foundations of what became one of the most important conceptual tools in investment arbitration: the distinction between contract and treaty claims.<sup>48</sup> This decision annulled what were the main merits findings of the preceding award. It would be misguided, however, to disregard the findings of the first *Vivendi* tribunal since they include relevant ideas for investment claims’ admissibility. In particular, that the parties’ agreement to submit disputes under the contract to a forum different from the investment treaty tribunal, while in principle not ousting the latter’s jurisdiction, should not be completely disregarded in considering the substance of treaty claims.

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<sup>42</sup> See *Consortium RFCC* (Award) [48]; *Ampal* (Jurisdiction) [255].

<sup>43</sup> *Bayindir* (Award) [135].

<sup>44</sup> Jennings (1961) 177.

<sup>45</sup> *Ibid*, 182.

<sup>46</sup> *Bayindir* (Award) [197].

<sup>47</sup> *Saluka* [302].

<sup>48</sup> Haersolte-Van Hof and Hoffmann (2008) 966; Sasson (2010) 153; Voss (2011) 163.



(a) *The Vivendi I award*

The *Vivendi* case involved a concession for the operation of water and sewage facilities in Tucumán, an Argentine province.<sup>49</sup> The contract contained a clause submitting disputes over the interpretation and application of the contract to the provincial courts.<sup>50</sup> For the first *Vivendi* tribunal, the core issue ‘concern[ed] the legal significance that [was] to be attributed to this forum-selection provision of the Concession Contract in light of the remedial provisions in the BIT and the ICSID Convention’.<sup>51</sup> The tribunal observed that this question had a bearing not only on the jurisdictional aspects, but also on the merits of the dispute.<sup>52</sup>

The *Vivendi I* tribunal did find it had jurisdiction over the case. This finding was based on the distinction between contract and treaty claims,<sup>53</sup> although the tribunal did not fully spell out the contours of the distinction. It stated that ‘[a]s formulated’, the claims against Argentina were ‘not subject to the jurisdiction of the contentious administrative tribunals of Tucumán, if only because, *ex hypothesi*, those claims [were] not based on the Concession Contract but allege[d] a cause of action under the BIT’.<sup>54</sup> The choice of forum clause in the contract did not affect the tribunal’s jurisdiction because it did not and could not constitute a waiver of the right to bring treaty claims.<sup>55</sup> Yet as a merits issue pertaining to Argentina’s responsibility under the BIT, the tribunal held that

because of the crucial connection in this case between the terms of the Concession Contract and these alleged violations of the BIT, the Argentine Republic cannot be held liable unless and until Claimants have, as Article 16.4 of the Concession Contract requires, asserted their rights in proceedings before the contentious administrative courts of Tucumán and have been denied their rights, either procedurally or substantively.<sup>56</sup>

On the facts of the case, to determine whether the contested measures were an exercise of sovereign authority or merely of contractual rights the tribunal had to ‘undertake a

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<sup>49</sup> *Vivendi I* [25].

<sup>50</sup> *Ibid* [27].

<sup>51</sup> *Ibid*, 2.

<sup>52</sup> *Ibid*.

<sup>53</sup> Haersolte-Van Hof and Hoffmann (2008) 965; *Aguas del Tunari* [114].

<sup>54</sup> *Vivendi I* [53].

<sup>55</sup> *Ibid*.

<sup>56</sup> *Ibid* [78].

detailed interpretation and application of the Concession Contract', a task the contractual parties had left exclusively to the local courts.<sup>57</sup> The tribunal could not 'separate the breach of contract issues from violations of the BIT, considering that the parties to the Concession Contract [had] agreed to an exclusive remedy in the Tucumán courts for the determination of the disputed contractual issues which [were] not governed by the BIT'.<sup>58</sup>

The outcome resembles the *SGS v Philippines* tribunal's admissibility determination (discussed below), which while deciding that jurisdiction was present referred the parties to the domestic courts for the assessment of the amount due.<sup>59</sup> However, unlike in *SGS v Philippines*, the *Vivendi I* tribunal concluded it was not possible for it to decide certain claims.<sup>60</sup> The impossibility was neither jurisdictional nor purely factual, but rather resulted from the combined effect of the subject matter of the claims plus the contractual parties' decision to submit their disputes to local courts. While this impossibility did not pass muster with the first *Vivendi* annulment committee, a 'crucial connection' between the terms of a contract and treaty claims is not rare in investment arbitration. For example, an investment tribunal may be required to decide a contractual issue, such as whether the contract is valid or the scope of rights under the contract, before deciding on the treaty claim.<sup>61</sup> The fact that the investment consists of contractual rights does not mean that the only remedies available are those of the contract.<sup>62</sup> Yet a 'crucial connection' between treaty and contract matters, coupled for instance with a contractual forum selection provision,<sup>63</sup> may be relevant admissibility considerations vis-à-vis treaty claims. In particular, when there are other legal grounds militating against admissibility.<sup>64</sup>

(b) *The Vivendi I annulment decision*

In the first annulment decision in *Vivendi*, the *ad hoc* committee considered the relationship between Argentina's international responsibility under the BIT and the rights

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<sup>57</sup> Ibid [79].

<sup>58</sup> Ibid, fn 20.

<sup>59</sup> Schreuer (2006) 162.

<sup>60</sup> Ibid.

<sup>61</sup> *Ampal* (Liability) [259].

<sup>62</sup> *Venezuela Holdings* (Annulment) [169].

<sup>63</sup> See *Parkerings* [316].

<sup>64</sup> See Chapter 2.

and obligations of the parties to the contract in question.<sup>65</sup> The committee observed that contracts and treaties set independent standards—which may lead to independent breaches—relying on the principle of Article 3 of the ILC Articles.<sup>66</sup> Under this principle whether there has been a breach of the BIT and whether there has been a breach of contract are different questions. Each of these claims will be determined by reference to its own proper or applicable law—in the case of the BIT, by international law; in the case of the Concession Contract, by the proper law of the contract.<sup>67</sup>

The distinction between breach of contract and breach of treaty related thus to the ‘distinction between the role of international and municipal law in matters of international responsibility’.<sup>68</sup>

The committee next introduced the concept of ‘essential’ or ‘fundamental basis of the claim’, without however defining what the concept meant or giving any detail as to its proper scope. The committee, however, clearly stated that when the essential basis of the claim is a breach of contract the international tribunal will respect ‘any valid choice of forum clause in the contract’.<sup>69</sup> The claim will be dismissed ‘without prejudice on its merits, when presented to the proper judges’, as stated by the commission in *Woodruff*.<sup>70</sup> But where “the fundamental basis of the claim” is a treaty laying down an independent standard by which the conduct of the parties is to be judged, the existence of an exclusive jurisdiction clause in a contract between the claimant and the respondent state or one of its subdivisions cannot operate as a bar to the application of the treaty standard’.<sup>71</sup> In the case of a treaty claim, the analysis is governed by international law and ‘is neither in principle determined, nor precluded, by any issue of municipal law, including any municipal law agreement of the parties’.<sup>72</sup>

An international tribunal with jurisdiction should not fail to pass judgment over a treaty claim on the ground that the claim should have been decided by local courts or in

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<sup>65</sup> *Vivendi I Annulment* [94].

<sup>66</sup> *Ibid* [95].

<sup>67</sup> *Ibid* [96].

<sup>68</sup> *Ibid* [97].

<sup>69</sup> *Ibid* [98].

<sup>70</sup> *Ibid* [100].

<sup>71</sup> *Ibid* [101].

<sup>72</sup> *Ibid* [102].

application of a contract clause submitting disputes to a different forum.<sup>73</sup> The committee deemed unacceptable that when there has been a breach of international law an exclusive jurisdiction clause in a contract would prevent ‘its characterisation as such’.<sup>74</sup> It was precisely the failure by the tribunal to determine whether the conduct of the Province’s authorities, as opposed to that of the federal authorities, amounted to a breach of the BIT that led to annulment.<sup>75</sup> Having concluded that it had jurisdiction, the tribunal was required to assess the case against the treaty provisions’ requirements, which the tribunal had failed to do with respect to a material part of the claimants’ case.<sup>76</sup>

In examining the leading case on the contract claims/treaty claims distinction,<sup>77</sup> it is important to bear in mind that it concerned an annulment decision not an award. The committee itself noted the limited character of its jurisdiction, observing that it was not its function to decide whether BIT breaches had taken place.<sup>78</sup> Further, the committee adopted a clear stance as to the lack of effect of contractual choice of forum provisions and local proceedings on the assertion of international jurisdiction. However, it suggested that these kinds of issues are relevant more generally. First, an exclusive jurisdiction clause in a contract ‘might be relevant—as municipal law will often be relevant—in assessing whether there has been a breach of the treaty’.<sup>79</sup> Second, in light of a BIT provision empowering the tribunal to apply private agreements concluded in relation to the investment, the committee affirmed that ‘the Tribunal had jurisdiction to base its decision upon the Concession Contract, at least so far as necessary in order to determine whether there had been a breach of the substantive standards of the BIT’.<sup>80</sup> Finally, the committee observed that while not dispositive and not precluding a tribunal from considering the merits, the presence of ready, able, and independent local courts could be relevant in a liability determination under international law.<sup>81</sup>

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<sup>73</sup> Ibid [102-103].

<sup>74</sup> Ibid [103].

<sup>75</sup> Ibid [111-115].

<sup>76</sup> Ibid [112].

<sup>77</sup> Schreuer (2005) 281.

<sup>78</sup> *Vivendi I Annulment* [112].

<sup>79</sup> Ibid [101].

<sup>80</sup> Ibid [110].

<sup>81</sup> *Vivendi I Annulment* [113].

For the *Vivendi I* committee, although the contract itself—including any choice of forum clause—and local proceedings should not prevent the treaty tribunal from considering the merits of the case, they may be relevant ‘in assessing whether there has been a breach of the treaty’. The contract/treaty distinction does not, therefore, exclude the relevance of contractual terms, among other contractual/national law aspects, in a treaty liability determination. This is *a fortiori* applicable to admissibility, which is not concerned with whether the contract or the treaty has been breached but rather with whether such determination, over all or part of the treaty claim,<sup>82</sup> should be made. Although the contract may not displace treaty obligations, it may be relevant ‘for the ascertainment of the content and consequences of those obligations’.<sup>83</sup> Thus, contractual aspects may also be relevant in deciding the admissibility of treaty claims, in combination with legal grounds recognized by international law. Further, the *Vivendi I* annulment committee’s observation that in treaty claims the tribunal may, to the extent necessary, ‘base its decision upon’ the contract, discredits attempts to isolate claims under IIAs from the underlying contractual framework. On the contrary, it is an indication of substantive interconnectedness between contract and treaty claims.

## 2 *The fundamental basis and the substance of the claim*

### (a) *Definition*

After the annulment decision in *Vivendi I*, the ‘fundamental’ or ‘essential’ basis of the claim idea has become one of the central tenets of the cause of action in investment arbitration. Yet the decisions that have applied the concept have generally not defined it or otherwise contributed to its elucidation. In *Vivendi I* it featured closely linked both to the jurisdictional determination of the competent forum and to the applicable law: when the fundamental basis of the claim is a treaty, international law applies; when it is a contract, the law of the contract (generally national law) governs the claim. But even at the level of general principle the separation is hardly complete,<sup>84</sup> in that national law may be relevant in adjudicating treaty claims as advanced by the *Vivendi I* annulment committee itself. Moreover, the very idea of ‘fundamental basis’ appears to indicate that investment treaty tribunals may be dealing with claims that are not purely treaty-based.

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<sup>82</sup> See Siwy (2017) 222 (admissibility allows investment tribunals to decide that ‘contractual aspects of a treaty-dispute [are] best to be decided by the contractually agreed forum’).

<sup>83</sup> *Venezuela Holdings (Annulment)* [180].

<sup>84</sup> Arato (2016) 29.

Thus, both contract and treaty aspects constitute the claims' basis although, at least for jurisdictional purposes, only one of these bases defines each claim's legal characterization.

In international investment law, the fundamental basis refers to the predominant legal basis of the claim; the legal arguments that imbue the claim and prevail, in terms of the formulation of the case, over other peripheral legal arguments that the claimant may have also advanced. The legal basis of the claim, however, is connected both to normative elements—i.e., the provisions being invoked—and to the facts involved in each claim. For example, a claim may involve the direct expropriation of a plant, a matter par excellence covered by IIAs, and also instances of non-compliance by governmental entities with contractual arrangements.<sup>85</sup> The fundamental basis is constituted by the most relevant legal provisions for purposes of resolving the case, in light of the most important facts of the claim. This requires a determination, generally under some sort of *prima facie* test, of first, the scope, object, and purpose of the provisions and legal instruments involved, and second the relative importance of the different facts in question. This depends on case-specific factors, such as which are the facts that had the greatest impact on the operation of the investment and/or the evolution of the dispute, considered under a holistic approach rather than isolating the claim's different parts.

*(b) Distinguishing between contract and treaty bases*

Despite the apparent general acceptance of the 'fundamental basis of the claim' idea, there seems to be less consensus as to important connected notions.<sup>86</sup> In particular, the main factor(s) in determining whether the fundamental basis of the claim is a contract or a treaty are unclear. Thus, as to the character in which the state acted when adopting the relevant measure, the *Vivendi I* committee criticized the preceding tribunal's observation that it could not establish which of the state measures in question had been taken exercising sovereign authority and which in the exercise of the relevant authority's rights as contractual party.<sup>87</sup> For the committee, this observation implied that conduct 'carried

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<sup>85</sup> See *Impregilo* (Award) [183-189] (while some of the claims concerned 'mere contractual issues', others advanced that the investment had been 'expropriated and [had been] subject to unfair treatment, these being clearly issues under the BIT and not exclusively contractual claims').

<sup>86</sup> Kaufmann-Kohler argued '[t]here is consistency on the distinction between treaty and contract claims'. Kaufmann-Kohler (2008) 138. This is correct only in the sense that investment tribunals recognize the existence of the distinction. *Cf* Crawford (2008) 97; Arato (2016) 28.

<sup>87</sup> See *Vivendi I* [79].

out in the purported exercise of its rights as a party to the Concession Contract could not, *a priori*, have breached the BIT'.<sup>88</sup> However, 'whether particular conduct involves a breach of a treaty is not determined by asking whether the conduct purportedly involves an exercise of contractual rights'.<sup>89</sup>

The distinction between sovereign and other types of breaches relating to contracts, nonetheless, was already present, for example, in Professor Dunn's 1932 work.<sup>90</sup> It was also adopted by Schwebel, who asserted that a state's violation of a contract with an alien breaches international law when it is a breach 'for governmental rather than commercial reasons'.<sup>91</sup> More recently, the *Impregilo v Pakistan* tribunal observed:

In order that the alleged breach of contract may constitute a violation of the BIT, it must be the result of behaviour going beyond that which an ordinary contracting party could adopt. Only the State in the exercise of its sovereign authority ("*puissance publique*"), and not as a contracting party, may breach the obligations assumed under the BIT.<sup>92</sup>

The *Abaclat* tribunal's focus was similar yet somewhat broader. A claim cannot be considered a 'pure' contract claim if the state's behaviour or the 'circumstances' appear to involve an 'exercise of sovereign State power'.<sup>93</sup>

In the jurisdictional decision in *Bayindir*, the tribunal stated that the '*puissance publique*' test is only relevant where the claimant relies on a contractual breach to assert a treaty claim.<sup>94</sup> But even if a contract is involved in the dispute, when a treaty breach is invoked the alleged violation is 'by definition an act of "*puissance publique*"'.<sup>95</sup> Without explanation, the tribunal restricted this statement to cases where the host state is not party to the contract.<sup>96</sup> It left for the merits, however, the decision on whether the measures in question were sovereign acts.<sup>97</sup> The merits award noted that 'because a treaty breach is

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<sup>88</sup> *Vivendi I Annulment* [110].

<sup>89</sup> *Ibid.*

<sup>90</sup> Dunn (1932) 165. See also Hyde (1945) 991. Mann, however, described Hyde's statement that in certain circumstances a breach of contract through the use of sovereign power may violate international law 'a singularly bare and unconvincing assertion'. Mann (1960) 579.

<sup>91</sup> Schwebel (1987) 412; see also Schwebel (1987-II) 113.

<sup>92</sup> *Impregilo v Pakistan* [260] (footnote omitted).

<sup>93</sup> *Abaclat* [318].

<sup>94</sup> *Bayindir* (Jurisdiction) [183].

<sup>95</sup> *Ibid.*

<sup>96</sup> *Ibid.*

<sup>97</sup> *Ibid.*

different from a contract violation’, the claimant had to establish a breach ‘different in nature from a simple contract violation’, which is one committed by the state ‘in the exercise of its sovereign power’.<sup>98</sup>

The statements in the *Bayindir* decisions that a treaty breach is by definition a sovereign act,<sup>99</sup> on the one hand, and that there is a treaty breach only when an exercise of sovereign power is involved, on the other, are not persuasive. Nor is it clear in what way the rule changes when the host state is directly party to the contract. Further, the reference in this context to the character in which the government acted when committing the alleged breach, although currently supported not only by arbitral tribunals<sup>100</sup> but also by commentators,<sup>101</sup> has been criticized.<sup>102</sup> Citing the ILC’s work on state responsibility, Crawford noted that, in general, a violation of international law ‘does not depend on the characterisation of the conduct in question as “governmental”, or as involving the exercise of sovereign authority’.<sup>103</sup> What matters is the content of the international obligation.<sup>104</sup>

The emphasis on what the international obligation requires, rather than on general notions about the state’s act’s ‘nature’, clarifies the general position. A treaty claim is one that derives from the breach of obligations contained in treaty provisions.<sup>105</sup> States are free to shape the scope of treaty obligations they are willing to assume and an evolution in the contents of common standards of protection is readily apparent in recent IIAs.<sup>106</sup> Unless the treaty provides otherwise, whether there has been a breach of such standards does not depend on whether the state acted in a sovereign capacity.<sup>107</sup> For example, a state

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<sup>98</sup> *Bayindir* (Award) [180]. See also *ibid* [377, 461] (on fair and equitable treatment and expropriation).

<sup>99</sup> See Martinez and Bray (2006) 4 (the jurisdictional decision in *Bayindir* ‘reflects an increasing receptiveness on the part of ICSID tribunals to contract-linked claims of foreign investors under a BIT’).

<sup>100</sup> See e.g. *Consortium RFCC* (Award) [65]; *Joy Mining* [72]; *Salini* (Jurisdiction) [155]; *Azurix* (Award) [53, 315]; *El Paso* (Jurisdiction) [79]; *Panamerican & BP* [108]; *Suez ARB/03/17* (Liability) [142]; *Suez ARB/03/19* (Liability) [153]; *Saur* (Jurisdiction and Liability 2012) [444]; *Hamester* [328].

<sup>101</sup> See McLachlan (2008) 390; Voss (2011) 173, 216; Siwy (2017) 212-215.

<sup>102</sup> Ho Qing Ying (2014) 136.

<sup>103</sup> Crawford (2008) 356. See also Sasson (2010) 156.

<sup>104</sup> Crawford (2008) 356.

<sup>105</sup> The degree of deference that should be accorded to the claimant’s characterization of the claims, however, concerns the standard of review at the jurisdictional phase, not what a treaty claim is.

<sup>106</sup> See e.g. CETA, Art 8.10 (containing a detailed regulation of the obligation of fair and equitable treatment).

<sup>107</sup> Certain authors have also referred to the character in which the state acted when concluding the contract. See Weil (1961) 207; Siwy (2017) 210. However, this aspect says even less about the treaty or contract basis of the claim than the sovereign or private character of the act that gives rise to the claim.



may act in an unfair or arbitrary way while breaching contractual provisions as an ‘ordinary contracting party’. This means that treaty and contractual liability may overlap, at least in the sense that they may derive from the same acts.<sup>108</sup> But this does not warrant making the application of IIA obligations depend on whether the state acted in a sovereign capacity when this is not required by the treaty provisions.<sup>109</sup>

Further, concepts developed in the field of state immunity before national courts—such as the distinction between acts *iure gestionis* and *iure imperii*—should not be directly applied to distinguish between contract and treaty claims before international tribunals.<sup>110</sup> State immunity’s traditional foundations relate to the principle that one state cannot exercise jurisdiction over another one because they are equals.<sup>111</sup> The movement to confine immunity to acts *iure imperii*, starting at the end of the 19th century, derived from states’ increased commercial activities and the need to hold them accountable for ordinary business transactions.<sup>112</sup> The contract/treaty distinction is not concerned with jurisdictional relationships between states. Rather, it seeks to determine, in claims potentially involving treaty and contract liability, which of the two prevails in any specific claim, and the implications for the jurisdiction and the law applicable to the claim.

However, the observation that all depends on the applicable obligation’s contents begs the question as to what these contents in international investment law are. While this ultimately hinges on the scope of each standard of treatment in each IIA, investment treaty protection is concerned with the treatment by sovereigns of private actors. Admittedly, not all acts by sovereigns constitute sovereign acts, in the sense of acts involving the exercise of state powers that non-state actors cannot engage in. Yet, one of IIAs’ main functions is to control state power<sup>113</sup> when ordinary remedies are not readily available.<sup>114</sup>

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<sup>108</sup> Cf Cremades and Cairns (2005) 17. But see Gaffney and Loftis (2007) 27.

<sup>109</sup> Siwy argues that a state may incur international liability if it breaches a contract through ‘means available to it due to its sovereign position’. Siwy (2017) 215. While this may be the position under general international law, it does not speak to the contents of the *lex specialis* created by IIA obligations. But see McLachlan (2008) 417-418.

<sup>110</sup> For the UK, ‘principles developed in the context of State immunity are not necessarily applicable in the context of State responsibility’. Comments on Draft Articles, 37. Further: Amerasinghe (1964) 884; Voss (2011) 178; Dupuy (2016) 802.

<sup>111</sup> Sucharitkul (1982) [14]; Stoll (2011) [4].

<sup>112</sup> Hafner (2010) [23]; Stoll (2011) [6]; *Germany v Italy* [57].

<sup>113</sup> Douglas (2009) 1, 89; Voss (2011) 177; Weiler (2013) 23; *Pan American* [108].

<sup>114</sup> See *Malicorp* (Award) [103].

In this light, the character in which the state acted may play a role in the contract/treaty distinction. For example, if a state party to a contract adopts a legislative measure modifying the contractual terms without the consent of the other party, this may be important to determine whether the measure gives rise to a treaty or a contract claim. Here, however, the crucial question is still not whether the state acted as a sovereign, which it did, but whether it acted in an unfair and inequitable, discriminatory, or arbitrary way or otherwise in breach of an IIA obligation.

(c) *The claims' substance*

Aside from the debate regarding whether a treaty claim related to a contract requires the existence of a sovereign act, on some other points there seems to be consensus. Investment tribunals agree that contract and treaty claims are 'juridically'<sup>115</sup> and 'analytically distinct',<sup>116</sup> subject to different 'legal standards'.<sup>117</sup> The two kinds of claims are 'different things, responding to different tests, subject to different rules'.<sup>118</sup> The *Bayindir* tribunal even asserted 'the principle of the independence of treaty claims and contract claims'.<sup>119</sup> At the same time, tribunals often acknowledge that treaty and contract claims may 'perfectly coincide',<sup>120</sup> that they may 'arise out of the same facts',<sup>121</sup> or at least that 'the factual basis of the two types of claims may to a large extent coincide'.<sup>122</sup> For the *EDF* tribunal, however, '[t]here is nothing mysterious about the fact that the same acts may constitute both a contractual breach and a violation of relevant treaty obligations'.<sup>123</sup>

Yet treaty and contract claims that coincide as to the factual basis are interrelated. While underscoring the different legal bases of the claims, the *Vivendi I* committee never advanced the 'independence' of treaty claims. Nor did it suggest an exclusive application of international law in treaty claims related to contractual breaches, to the exclusion of

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<sup>115</sup> *Bayindir* (Jurisdiction) [148].

<sup>116</sup> *Impregilo v Pakistan* [258]. See also Gaffney and Loftis (2007) 27.

<sup>117</sup> *EDF* (Award) [1135].

<sup>118</sup> *Duke v Ecuador* [342]. Cf Charles I's 1649 speech: 'A Subject and a Sovereign are clean different things.' Quoted in Crawford (2008) 351.

<sup>119</sup> *Bayindir* (Jurisdiction) [166].

<sup>120</sup> *Impregilo v Pakistan* [258].

<sup>121</sup> *Bayindir* (Jurisdiction) [148].

<sup>122</sup> *Impregilo v Argentina* [182].

<sup>123</sup> *EDF* (Award) [931]. See also Alexandrov (2006) 556.

the law of the contract, which would be unrealistic<sup>124</sup> and undesirable.<sup>125</sup> Further, the object of the claims may be substantially the same. For example, in *Philip Morris v Uruguay* the tribunal noted that the granting of a remedy sought in a local claim ‘would have answered the Claimants’ claims, under both domestic and international law, including the BIT’.<sup>126</sup> The ICJ’s Chamber in *ELSI* recognized that the Italian proceedings’ substance was the same as that of the case before it, even if the parties and the applicable law were different.<sup>127</sup> The *Teinver* tribunal adopted a similar reasoning vis-à-vis a local expropriation claim and the investment arbitration. The subject matter of both proceedings was not identical, one concerning the valuation of the expropriated assets and the other whether the expropriation had breached IIA standards of treatment.<sup>128</sup> Yet, substantively, both proceedings had the same goal: make the foreign investors and their local subsidiary whole for the loss caused by the expropriation.<sup>129</sup>

Leaving aside jurisdictional decisions, which focus on the provisions containing consent to international jurisdiction, reliance on the supposed ‘independence’ between contract and treaty claims is particularly problematic in admissibility or merits decisions. If there are considerable overlaps as to the facts giving rise to the claim and perhaps the applicable law (let alone the damages claimed), the substance—or to borrow the words of the parties in the *Ambatielos* case before the ICJ, the ‘substantive foundation’<sup>130</sup>—of the ‘contract’ and the ‘treaty’ dispute may be the same.<sup>131</sup> If so, treaty and contract rights and obligations should not be independently considered and remedies independently granted. More generally, the law applicable to treaty claims, which often includes national law, is

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<sup>124</sup> Even Weil, one of the early defenders of the ‘internationalization of contracts’, argued that the application of international law ‘could not but be partial, and certain aspects of the contractual relationships would remain in any case subject to the national law of the contracting state’. Weil (1961) 188. Author’s translation (original French).

<sup>125</sup> Arato (2016) 8.

<sup>126</sup> *Philip Morris v Uruguay* (Jurisdiction) [112].

<sup>127</sup> *ELSI*, 46. In fact, it appears that the relevant treaties were not even mentioned in the Italian proceedings. Ibid.

<sup>128</sup> *Teinver* (Jurisdiction) [132].

<sup>129</sup> Ibid. See also *SGS v Philippines* [149].

<sup>130</sup> *Ambatielos* (Merits), 13, 16.

<sup>131</sup> Schreuer observed that ‘[t]he idea that contract claims and BIT claims are conceptually separate and are subject to different standards is intellectually attractive’, but ‘essentially the same legal dispute’—‘more semantics than reality’—may really be what is at issue. Schreuer (2006) 162, 171.

not isolated from the one applicable to contract claims.<sup>132</sup> The alleged strict independence must also be considered against the backdrop of the continuing difficulty in distinguishing contract and treaty claims.<sup>133</sup> Further, even taking the distinction based on the character of the state act at face value, the substance of contract and treaty breaches may still coincide if only because nothing prevents a sovereign act from breaching a treaty and a contract at the same time.<sup>134</sup>

### 3 *From contract to treaty*

A contract breach by a state is *per se* not considered a breach of international law.<sup>135</sup> Something more is required.<sup>136</sup> The point here is whether it is difficult for a contract breach to transform into a treaty breach, because the difference between the two is significant or for some other reason, and how this relates to the alleged independence between contract and treaty claims for admissibility purposes. This thesis argues, first, that the concepts used to describe the additional element are often less demanding than in the past, plus the fact that a denial of justice is no longer required. Second, investment tribunals frequently equate a breach of contract to a frustration of the investor's legitimate expectations (and thus to a breach of fair and equitable treatment). The result is an easy transmutation of contract breaches into treaty breaches. The two kinds of breaches have got considerably closer, to the point of sometimes becoming substantively indistinguishable. Third, this outcome is incompatible with maintaining a strict independence of treaty claims vis-à-vis the contract, not least in admissibility and merits determinations.

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<sup>132</sup> See Chapter 7.

<sup>133</sup> Cremades (2005) 7.

<sup>134</sup> See Kreindler (2005) 192. As the alleged treaty breach is, on the facts of the case, farther removed from any issue of interpretation or application of the contract in question, the overlap in terms of the substance of any potential contract and treaty claims may be negligible or even non-existent. But this is more a function of the facts of the case than of any intrinsic attribute of the different claims.

<sup>135</sup> Jennings and Watts (1996) 927.

<sup>136</sup> Von Walter (2015) 84. During the first part of the 20th century, the contrary position, i.e., that a breach by a state of a contract with a foreigner could suffice for international law to be infringed, was still being advanced. However, it was not always advocated in an unqualified manner. In *Ambatielos*, Greece did argue that when the contract is with a foreigner 'the State incurs a direct responsibility on breach of the contract'. *Memorial of Greece*, 71. But even Switzerland in the *Losinger & Co.* case—generally mentioned as an example of this position—was not discussing just any kind of contract breach but one resulting from subsequent legislation of the state party to the contract. P.C.I.J., Ser. C, No. 78, p. 32. And France in *Norwegian Loans* referred generally to a 'modification of the substance of the international contracts', an 'arbitrary breach' or 'taking' of the contract. See Mann (1960) 578.

Traditionally, different propositions were made as to such additional element including, for example, the references by the United Kingdom ('UK') in *Ambatielos* to breaches of contract involving 'an obviously arbitrary or tortious element',<sup>137</sup> by the US in the *Shufeldt* case to 'arbitrary cancellation' of the contract,<sup>138</sup> and in the 1961 Harvard Draft Convention to 'a clear and discriminatory departure from the proper law of the contract'.<sup>139</sup> A denial of justice of some sort was sometimes required. For De Visscher, international responsibility could arise

in connection with an undertaking contained in a contract under municipal law, if there is a denial of justice to the foreign concessionary through default of the ordinary courts or through a refusal to submit the dispute to any arbitral procedure that may have been substituted for internal jurisdiction.<sup>140</sup>

Similarly, Hyde contended that a breach of contract did not involve a violation of international law, unless there was either a failure to adjudicate the contract claims locally or, 'following an adjudication, to heed the adverse decision of a domestic court'.<sup>141</sup>

While the idea that an additional element is necessary to turn a contract breach into a treaty breach is nowadays largely accepted in investment arbitration, different concepts are used to define such additional element. It is contended that treaty protection is likely to be available in cases of 'significant interference' with the investor's contractual rights,<sup>142</sup> an 'outright repudiation of the transaction',<sup>143</sup> an 'arbitrary intervention',<sup>144</sup> or a 'serious repudiation'.<sup>145</sup> Reference is no longer made to a need for a denial of justice before the contractual forum, although 'the availability of local remedies to an investor faced with contractual breaches' is sometimes considered relevant in determining whether the state has breached certain IIA standards.<sup>146</sup>

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<sup>137</sup> Fitzmaurice (1961) 64.

<sup>138</sup> Schwebel (1987) 409.

<sup>139</sup> Harvard Draft Convention, Article 12, 1(a).

<sup>140</sup> De Visscher (1957) 194.

<sup>141</sup> Hyde (1945) 990. This is not to be confused with the requirement of exhaustion of local remedies. According to this view, there may not be an international delinquency in a case of breach of contract without some element of denial of justice, regardless of whether local remedies have been exhausted. Further: Amerasinghe (1964) 912.

<sup>142</sup> *CMS* (Award) [299].

<sup>143</sup> *Waste Management II* (Award) [160].

<sup>144</sup> *Ibid.*

<sup>145</sup> *EDF* (Award) [940].

<sup>146</sup> *Waste Management II* (Award) [116].

Aside from the lack of a requirement of denial of justice, the interpretation given to treaty standards of protection must be taken into account. Alexandrov argued that a breach of contract is often also a violation of IIA obligations.<sup>147</sup> With respect to the fair and equitable treatment standard, the tribunal in *Sempra* first quoted the finding in *Tecmed* that foreign investments shall be treated in such a way that it does not affect the foreign investor's basic expectations when making the investment.<sup>148</sup> It then added that under this standard

[w]hat counts is that in the end the stability of the law and the observance of legal obligations are assured, thereby safeguarding the very object and purpose of the protection sought by the treaty.<sup>149</sup>

Investors' legitimate expectations have been described as the 'dominant element' of the fair and equitable treatment standard, under which states may not frustrate such expectations.<sup>150</sup>

Contemporary ideas of 'serious repudiation' or 'significant interference' do not set a higher threshold than prior references to 'an obviously arbitrary or tortious element' or 'clear and discriminatory departure' from the contract. Admittedly, much depends on how investment tribunals interpret these broad concepts embodying the additional element, including the alleged requirement that the breach involve the exercise of sovereign power. The *CMS* tribunal seemed to endorse this latter requirement by noting that '[p]urely commercial aspects of a contract might not be protected by the treaty in some situations'.<sup>151</sup> IIA protection will be triggered only 'when there is a specific breach of treaty rights and obligations or a violation of contract rights protected under the treaty'.<sup>152</sup> However, given that contract rights are usually protected under IIAs, this conception does not exclude much in terms of contractual breaches.

Thus, the 'additional element' is not extremely exacting, especially when the interpretation given to certain standards of treatment is factored in. Indeed, the passage

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<sup>147</sup> Alexandrov (2006) 564. See also *SGS v Paraguay* fn 134; Wälde and Sabahi (2008) 1090; Sasson (2010) 153.

<sup>148</sup> *Sempra* (Award) [298].

<sup>149</sup> Ibid. Further: *CMS* (Award) [274-275]; *Enron* (Award) [260].

<sup>150</sup> *Saluka* [302].

<sup>151</sup> *CMS* (Award) [209-301].

<sup>152</sup> Ibid [299]. This is tantamount to saying that there will be a treaty claim whenever there is a treaty breach. Here, the consequences for the distinction between contract and treaty claims are unclear. For example, does a claim whose fundamental basis is a contract become a treaty claim merely by dint of a single and perhaps peripheral instance of treaty breach?

from contract to treaty breach is nowadays not particularly difficult.<sup>153</sup> The upshot may be seen by some as a natural (and even healthy) evolution of international law, as well as the result of what states bargained for in IIAs. After all, Jennings was probably right when observing, decades before the BIT generation, that there is nothing intrinsic to the national and international legal structures ‘that inhibits the sanctioning of contractual obligations by international law’.<sup>154</sup> The ease with which a breach of contract may acquire the standing of a breach of treaty<sup>155</sup> has allowed a notable expansion of investment tribunals’ jurisdiction. However, this easy passage from contract to treaty claims—along with the referred to overlaps as to the facts and applicable law—does not sit well with maintaining a strong ‘juridical’ and ‘analytical’ ‘independence’ of both types of claims. When little is required to assert treaty jurisdiction over a contract breach, resolving the treaty claim in relative isolation from factors said to pertain to the contract claim, such as limits to recovery stemming from the contract, becomes problematic. Under the guise of the ‘independence’ of treaty rights, the proper law of the contract is ignored<sup>156</sup> and the substantive relationship between treaty and contract claims obscured.<sup>157</sup>

## II. FROM JURISDICTION TO ADMISSIBILITY

Investment tribunals have often discussed the relationship between treaties and contracts in decisions on jurisdiction. For this purpose, affirming a supposed independence of treaty claims is unnecessary. The idea of ‘fundamental basis’ provides an adequate, if rather general, conceptual framework. For admissibility (or merits) determinations, however, the same idea of independence provides an unpersuasive basis for the analysis. Distinguishing between contract and treaty claims is often necessary in jurisdictional decisions, in particular when the investment tribunal only has jurisdiction over treaty claims. Here the contract/treaty distinction is useful, especially because the claim’s ‘fundamental basis’ may often be determined through a *prima facie* analysis (which assumes the claimant’s case to be true for certain purposes and thus allows for a

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<sup>153</sup> But see *Vanessa* (Award) [214].

<sup>154</sup> Jennings (1961) 161.

<sup>155</sup> This is so even leaving aside the effect of ‘umbrella clauses’. The term ‘umbrella clause’ in international investment law refers to a clause in an IIA requiring the state parties to comply with commitments they have assumed. See Schramke (2007) 2; Sinclair (2013) 107; Hobér (2014) 213.

<sup>156</sup> Douglas (2014) 387.

<sup>157</sup> Arato (2016) 21, 29.

jurisdictional decision before hearing the merits).<sup>158</sup> Once the substance of the treaty claim has been fully analysed, however, overlaps between treaty and contract claims raise admissibility concerns. Whether each claim's 'fundamental basis' is treaty or contract may still be relevant to admissibility, but along with other factors, such as the existence of a forum selection clause or local proceedings, the availability of the contractual forum, possible prejudice to third parties, overlaps in the damages claims, double recovery risks, etc. For the admissibility analysis, neither the contract/treaty distinction nor the fact that it is generally the shareholders who pursue the treaty claims and the local company the contract claims, should conceal the substantive links between contract and treaty claims and their potential implications.

This section first considers how concepts related to the contract/treaty distinction have developed at the jurisdictional stage and whether they should be maintained for admissibility purposes. It then analyses to what extent contractual forum selection clauses and parallel local proceedings raise admissibility rather than jurisdictional objections.

#### A Decisions on jurisdiction and the fundamental basis of the claim

Arbitral decisions that discuss at some length the distinction between contract and treaty claims frequently do not deal with the merits. After the *Vivendi I* annulment proceeding, these decisions were often preliminary decisions ruling on jurisdictional or admissibility objections. With respect to the applicable standard of review for determining jurisdiction—in particular to determine the 'treaty' nature of the claim—the leading case is *Impregilo v Pakistan*. In its preliminary jurisdictional ruling, the tribunal observed it did not have to rule on the merits of treaty claims, which had not been heard, but only to satisfy itself it had 'jurisdiction over the dispute, as presented by the Claimant'.<sup>159</sup> It endorsed the ICJ's statement in *Oil Platforms* to the effect that the Court had to ascertain whether the advanced treaty violations did or did not 'fall within the provisions of the Treaty and whether, as a consequence, the dispute [was] one which the Court [had] jurisdiction *ratione materiae* to entertain'.<sup>160</sup> Accordingly, the *Impregilo v Pakistan* tribunal assessed

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<sup>158</sup> Douglas (2009) 149.

<sup>159</sup> *Impregilo v Pakistan* [237].

<sup>160</sup> *Ibid* [239].



whether the facts as alleged by the claimant ‘if established, [were] capable of coming within those provisions of the BIT which [had] been invoked’.<sup>161</sup>

For preliminary decisions having to distinguish between contract and treaty claims, this test, in principle,<sup>162</sup> has generally met no serious objections.<sup>163</sup> Otherwise, tribunals would have to decide on the claims’ merits at preliminary stages of the arbitrations.<sup>164</sup> The point of interest here is, however, to what extent current concepts as to the independence of claims under treaties vis-à-vis claims under contracts have been developed in circumstances in which tribunals had still not heard the claims’ merits.<sup>165</sup> And to what extent investment tribunals, after taking the claimant’s claims at face value for purposes of a preliminary decision, revisited the issue whether the alleged treaty claims were really different from related contract claims. The *Enron* case illustrates this point.

In *Enron*, the tribunal issued two preliminary decisions on jurisdiction, one dealing with certain tax assessments by Argentine provinces<sup>166</sup> and the other with tariff measures adopted by Argentina in the early 2000s.<sup>167</sup> In the first decision, the tribunal noted that the claimants had ‘a separate cause of action under the Treaty’, which could be ‘asserted independently’ from the rights of the local companies.<sup>168</sup> In the second one, it relied on the annulment decision in *Vivendi I* and the jurisdictional decision in *CMS* for the proposition that contract and treaty claims are different.<sup>169</sup> While neither of the *Enron* preliminary decisions analysed the merits of the claims, the tribunal noted that ‘although

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<sup>161</sup> Ibid [254]. Several investment tribunals have adopted similar views on the standard of review for this jurisdictional determination. See e.g. *SGS v Pakistan* [144]; *SGS v Philippines* [157-159]; *Achmea II* [206].

<sup>162</sup> Cf *SGS v Pakistan* [145] (‘there may arise a situation where a tribunal may find it necessary at the very beginning to look behind the claimant’s factual claims’.)

<sup>163</sup> See *Bolivia v Chile* (Preliminary Objections) [26] (‘It is for the Court itself, however, to determine on an objective basis the subject-matter of the dispute between the parties’, although the Court ‘takes account of the facts that the applicant identifies as the basis for its claim’).

<sup>164</sup> Douglas (2009) 149.

<sup>165</sup> That current ideas were mostly developed in preliminary rulings is also true as regards shareholder standing. See Chapter 4.

<sup>166</sup> *Enron* (Jurisdiction I) [1]. This claim was later discontinued. *Enron* (Award) [26-28].

<sup>167</sup> *Enron* (Jurisdiction II) [8].

<sup>168</sup> *Enron* (Jurisdiction I) [25].

<sup>169</sup> *Enron* (Jurisdiction II) [50].

there [were] no doubt questions concerning the Contract between the parties, the essence of the claims, [in both cases], relate[d] to alleged violations of the Treaty rights'.<sup>170</sup>

In the award, the tribunal asserted that the main claim concerned an 'alleged right to calculate tariffs in US dollars'.<sup>171</sup> In the claimants' case, this right and other 'key tariff-related guarantees' resulted not from any treaty or otherwise international instrument, but entirely from contractual and national law provisions.<sup>172</sup> The tribunal was persuaded that such right existed—primarily on the basis of 'the examination of the legal and regulatory framework'—<sup>173</sup> and that, as a matter of Argentine law, had not been respected.<sup>174</sup> Regarding the treaty obligations, the tribunal concluded that 'a key element of fair and equitable treatment is the requirement of a "*stable framework for the investment*"'.<sup>175</sup> Since such 'legal and business framework'—on which the investors had relied to make their investments—had been 'substantially changed' and 'dismantled' by the challenged measures, there was an 'objective breach' of the fair and equitable standard.<sup>176</sup>

The links between contractual issues and the findings of treaty breach are clear here. The *Enron* tribunal's finding of treaty breach hinged to a large extent on the 'substantial' modification and 'dismantling' of contract and other national law provisions. Despite this, the ideas of independence, separability, and difference between contract and treaty rights and claims—affirmed on a *prima facie* basis without an analysis of the substance in the preliminary decisions—were not revisited in the award. As rightly noted by Arato in reference to the decisions in *CMS*, *Enron*, and *Sempra*, what was not discussed in any of the cases is the relationship between the fair and equitable treatment standard 'and the underlying contracts, and the extent to which the tribunals' interpretations of the standard affects the contractual arrangement'.<sup>177</sup> It may be argued that this poses no jurisdictional problem, since investment tribunals may uphold jurisdiction to address contract breaches that at the same time constitute treaty

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<sup>170</sup> Ibid [51].

<sup>171</sup> *Enron* (Award) [106].

<sup>172</sup> Ibid.

<sup>173</sup> Ibid [128].

<sup>174</sup> Ibid [231].

<sup>175</sup> *Enron* (Award) [260].

<sup>176</sup> Ibid [264-268].

<sup>177</sup> Arato (2016) 18.

violations.<sup>178</sup> As long as the tribunal finds the fundamental basis of the claim is the treaty, nothing more needs to be considered in terms of how to reconcile potentially overlapping rights and claims. Indeed, for strictly jurisdictional purposes this may be acceptable.

The *Vivendi I* annulment committee, which introduced the ‘fundamental basis’ concept in modern investment arbitration,<sup>179</sup> did not consider the merits of the case (given its limited jurisdiction). The concept is often useful in deciding whether a ‘treaty’ tribunal has jurisdiction *ratione materiae*, in particular when the claim has a mixed contract/treaty character. For example, a case may involve both discriminatory legislation evidently harming the investment, a treaty issue, and mere delays by a government agency in settling certain bills, a contract issue. Determining the claim’s fundamental basis, in application of a *prima facie* standard of review, allows investment tribunals to determine whether there is treaty jurisdiction without hearing the merits. It is not, however, a matter of ‘whether the claim truly does have an autonomous existence outside the contract’,<sup>180</sup> but of determining the claim’s predominant legal basis, considering the provisions and facts invoked. Full discussion of the facts may disclose substantive and substantial overlaps between contract and treaty claims, particularly as to the damages claimed. On the one hand, this realization does not necessarily affect the conclusion that the claim’s fundamental basis is a treaty for strictly jurisdictional purposes, i.e., that the claim, as formulated by the claimant, is one that may be heard by the treaty tribunal. On the other hand, in those circumstances the ‘fundamental basis’ notion does not warrant strictly separating contract and treaty beyond jurisdictional determinations.<sup>181</sup>

## B The impact of contractual forum selection clauses on admissibility

In Chapter 2, this thesis included forum selection clauses among admissibility considerations applicable to shareholder indirect claims under IIAs. Many tribunals have

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<sup>178</sup> *Enron* (Jurisdiction I) [91]. Voss argues that contract and treaty claims may derive from the same facts but still belong to different categories under the ‘principle of possible coincidence of treaty claims and contract claims’. Voss (2011) 166.

<sup>179</sup> *Pantechniki* [61].

<sup>180</sup> *Ibid* [64]. For the *Pantechniki* tribunal, to distinguish between treaty and contract claims it is necessary to ‘determine whether claimed entitlements have the same normative source’. But ‘[t]he frontiers between claimed entitlements are not always distinct’. *Ibid* [62]. See also Kjos (2013) 108 (whether the cause of action is contractual or non-contractual ‘is determined by the source of the right (and corresponding obligation) relied upon by the claimant’). These references appear accurate, yet they leave open the possibility that there may be more than one entitlement under different normative sources over the same assets.

<sup>181</sup> But see *SGS v Philippines* [156].

considered the issue of what effect, if any, such clauses have on international jurisdictions.<sup>182</sup> Investment tribunals have been consistent here. Since the fundamental basis of the claim is a treaty, contractual forum selection clauses do not bar jurisdiction in respect of treaty breaches.<sup>183</sup> The point is often accompanied by lack of privity arguments (i.e., because it is not a party to the contract but only a shareholder of one of the parties, the claimant is not bound by any contractual provision).<sup>184</sup> And also by the application of *prima facie* tests, which basically entail accepting the validity of the claimant's arguments for the jurisdictional aspects of interest here,<sup>185</sup> with the effect that forum choice provisions in contracts are generally bypassed in preliminary decisions. Nonetheless, particularly when jurisdictional issues are joined to the merits, certain tribunals have upheld jurisdictional objections based on the claims' contractual nature and the application of contractual forum selection provisions.<sup>186</sup> But even here the role of these provisions in defining treaty tribunals' jurisdiction has been limited and generally not affected the nub of the claim.

Despite these broadly consistent outcomes, *SGS v Philippines* inaugurated a different approach to choice-of-forum clauses. The tribunal was confronted with a provision submitting contractual disputes to the courts and the law of the Philippines.<sup>187</sup> The claimant submitted that, having missed payments under the contract, Philippines was in breach of the umbrella clause in the Philippines-Switzerland BIT,<sup>188</sup> which in turn attracted BIT jurisdiction.<sup>189</sup> The tribunal was concerned that a broad interpretation of the umbrella clause could 'override dispute settlement clauses negotiated in particular contracts'.<sup>190</sup> It concluded that under these clauses the proper law of the contract was not affected.<sup>191</sup> In particular as regards forum selection clauses, the tribunal found that

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<sup>182</sup> See Chapter 3.

<sup>183</sup> See e.g. *EDF (Jurisdiction)* [217-218, 221]; *AES* [92]; *EDF (Award)* [930]; Gaffney and Loftis (2007) 28; Dupuy (2016) 799; Ortiz, Ugalde-Revilla and Chinn (2017) 340.

<sup>184</sup> See *National Grid (Jurisdiction)* [169]; *Hochtief (Jurisdiction)* [118].

<sup>185</sup> See e.g. *Bureau Veritas I* [112].

<sup>186</sup> *Impregilo v Argentina* [189, 301-310].

<sup>187</sup> *SGS v Philippines* [22].

<sup>188</sup> The provision read: 'Each Contracting Party shall observe any obligation it has assumed with regard to specific investments in its territory by investors of the other Contracting Party.' *Ibid* [115].

<sup>189</sup> *Ibid* [113].

<sup>190</sup> *Ibid* [123].

<sup>191</sup> *Ibid* [128].

general provisions of BITs should not, unless clearly expressed to do so, override specific and exclusive dispute settlement arrangements made in the investment contract itself.<sup>192</sup>

Further, a tribunal should respect a binding exclusive jurisdiction clause in a case between the parties to the contract, unless the tribunal is ‘bound *ab exteriore*, i.e., by some other law, not to do so’.<sup>193</sup>

As the applicable forum selection clause affected the ‘substance’ of the claimant’s claim, the question was whether this went to the tribunal’s jurisdiction or the claim’s admissibility.<sup>194</sup> After quoting the *Vivendi I* annulment committee for the proposition that claims whose ‘essential basis’ is contractual are subject to any valid forum selection clause in the contract, the tribunal stated that ‘this principle is one concerning the admissibility of the claim, not jurisdiction in the strict sense’.<sup>195</sup> The central reason for this conclusion was that ‘treaty jurisdiction is not abrogated by contract’.<sup>196</sup> But, at the same time, a party should not be allowed—absent exceptional circumstances—to advance contractual claims before a forum different from the one exclusively provided for by the contract.<sup>197</sup> The tribunal relied on ‘the principle that a party to a contract cannot claim on that contract without itself complying with it, [which] is more naturally considered as a matter of admissibility than jurisdiction’.<sup>198</sup>

These observations referred to the relationship between exclusive jurisdiction clauses and contract claims—rather than treaty claims—albeit before an investment tribunal.<sup>199</sup> The tribunal affirmed its jurisdiction over both contract and treaty claims. The contract claims were inadmissible, however, because a decision would have been premature until the ‘scope or extent’ of the payment obligation had been clarified by the contractual forum.<sup>200</sup> Further, the treaty claims under the umbrella clause and fair and

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<sup>192</sup> Ibid [134]. The tribunal supported this reasoning with reference to the maxim *generalia specialibus non derogant* and the BIT as ‘a framework treaty, intended by the States Parties to support and supplement, not to override or replace, the actually negotiated investment arrangements’. Ibid [141].

<sup>193</sup> Ibid [138].

<sup>194</sup> Ibid [149].

<sup>195</sup> Ibid [154].

<sup>196</sup> Ibid.

<sup>197</sup> Ibid.

<sup>198</sup> Ibid.

<sup>199</sup> Ibid [143].

<sup>200</sup> Ibid [155].

equitable treatment provisions were also inadmissible. Without clarification from the contractual forum on the outstanding amount, ‘to decide on the claim in isolation from a decision by the chosen forum under [the contract was] inappropriate and premature’.<sup>201</sup>

In *Bureau Veritas*, which involved a contract for the provision of pre-shipment inspection of imports into Paraguay,<sup>202</sup> the tribunal upheld its jurisdiction over the fair and equitable treatment claim.<sup>203</sup> Here, it saw no admissibility problem deriving from the existence of an agreed contractual forum, essentially because the ‘fundamental basis’ of the claim was that treaty standard.<sup>204</sup> As regards the umbrella clause claim, however, while it also affirmed jurisdiction,<sup>205</sup> the tribunal observed that the provision imported into the BIT all contractual obligations, including those relating to the competent forum under the contract. This raised an admissibility issue.<sup>206</sup> To allow parties to a contract to invoke certain provisions of the contract and ignore others would contravene the ‘fundamental principle that the autonomy and will of the parties is to be respected’.<sup>207</sup> Thus, the tribunal found this claim to be inadmissible based on the exclusive jurisdiction clause in the contract, which was not overridden by the umbrella clause.<sup>208</sup>

The reasoning in *SGS v Pakistan* was different. The case involved a contract to provide pre-shipment inspection services over goods to be imported into Pakistan.<sup>209</sup> Any dispute arising under the contract was subject to arbitration under the law of Pakistan.<sup>210</sup> Based on this forum selection in the contract, Pakistan objected to the ICSID tribunal’s jurisdiction.<sup>211</sup> The tribunal concluded it had exclusive jurisdiction over treaty claims, the nature of the claims hinging—at the jurisdictional phase—on how the claimant had

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<sup>201</sup> Ibid [162-163]. The tribunal decided to stay the arbitral proceedings while the parties litigated the amount payable under the contract before Philippine courts. Ibid [175-176]. See also *Bosh* [252].

<sup>202</sup> *Bureau Veritas I* [7].

<sup>203</sup> Ibid [118-126].

<sup>204</sup> Ibid [127].

<sup>205</sup> Ibid [142].

<sup>206</sup> Ibid.

<sup>207</sup> Ibid [148].

<sup>208</sup> Ibid [159]. The tribunal joined to the merits the issue whether it should dismiss the claim or stay the exercise of jurisdiction. Ibid [161]. In the second decision on jurisdiction, the tribunal stayed its jurisdiction vis-à-vis the umbrella clause and fair and equitable treatment claims, subject to different possible developments in local proceedings. *Bureau Veritas II* [294].

<sup>209</sup> *SGS v Pakistan* [11].

<sup>210</sup> Ibid [15].

<sup>211</sup> Ibid [1].

characterized them.<sup>212</sup> However, it found it had no jurisdiction over contract claims which did not also constitute treaty breaches, not even under the umbrella clause.<sup>213</sup> One of the reasons to reject a broad reading of the umbrella clause, i.e., one that would ‘elevate’ all contract breaches to treaty violations, was that ‘the benefits of the dispute settlement provisions of a contract with a State also a party to a BIT, would flow only to the investor’, who could at will negate the effect of such provisions.<sup>214</sup>

In principle, distinguishing between contract and treaty claims for purposes of determining the impact of a forum selection clause is a jurisdictional issue.<sup>215</sup> To the extent that consent to arbitration in the applicable treaty provisions refers to treaty claims, interpreting the scope of such consent—including any conditions attached to it—vis-à-vis a competing provision of another instrument, is a decision on the jurisdiction of the tribunal rather than on the admissibility of the claim.<sup>216</sup> It is not a matter of treaty jurisdiction being potentially ‘abrogated by contract’, but simply of determining the tribunal’s *ratione materiae* jurisdiction under the treaty.<sup>217</sup> For this jurisdictional determination, the approach followed by the majority of investment tribunals—i.e., whether the ‘fundamental basis of the claim’ is a contract or a treaty—is acceptable.<sup>218</sup> However, when the substance of the treaty claim coincides with that of underlying contract claims, the idea that a party ‘should not be able to approbate and reprobate in respect of the same contract’<sup>219</sup> becomes applicable for admissibility purposes.<sup>220</sup>

The solution adopted in *SGS v Philippines* has been criticized. Seeking to respect both the contractual forum selection clause and the treaty dispute settlement provision,

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<sup>212</sup> Ibid [145].

<sup>213</sup> Ibid [161-162]. Kreindler criticized this holding because ‘the ability to consistently and reliably segregate [contract and treaty claims] and rule out any meaningful existence of overlap is imperfect at the very best’. Kreindler (2005) 192.

<sup>214</sup> *SGS v Pakistan* [168].

<sup>215</sup> See Crivellaro (2005) 87.

<sup>216</sup> See *Daimler* [193]; Chapter 2.

<sup>217</sup> Jurisdiction *ratione materiae* depends on whether the respondent has consented to the settlement by the international tribunal ‘of the specific dispute brought before it’. *Application Genocide Convention I* [122].

<sup>218</sup> See e.g. *TSA* [58]. In his concurring opinion in *TSA*, Abi-Saab asserted that ‘the same set of facts can give rise to [contract and treaty claims], but on condition that the treaty claim be “self-standing”, or, in other words, that it does not necessarily pass by or posit a contract violation as a fundamental element or premise of its cause of action’. *TSA* (Conc Op, Abi-Saab) [4].

<sup>219</sup> *SGS v Philippines* [155].

<sup>220</sup> See Salles (2014) 229; Shany (2015) 159.

by affirming jurisdiction but referring the claimant to the local courts, ‘attempts to render compatible two contradictory intentions’.<sup>221</sup> However, first, respect for the ‘contractually-agreed process’<sup>222</sup> is a relevant consideration for international tribunals, not least when a competing forum has been conferred exclusive jurisdiction.<sup>223</sup> Investment tribunals have weighed similar reasons when dealing with the substance of treaty claims.<sup>224</sup> Second and relatedly, admissibility covers a wide range of possibilities,<sup>225</sup> albeit different from jurisdiction and the merits.<sup>226</sup> As confirmed by the decisions in *SGS v Philippines* and *Bureau Veritas*, admissibility allows investment tribunals to consider the exercise of their jurisdiction when treaty claims overlap with contract claims covered by a contractual choice of forum. This rationale relates not only to the two main concerns of this thesis, i.e., risks of multiple recovery and prejudice to third parties, but also to the need to respect the balance agreed by the parties to the relevant contract.

The tribunal in *Aramco* endorsed similar notions when referring to the ‘interdependence’ of contractual obligations.<sup>227</sup> It was indisputable ‘that one of the parties must not benefit from the performance of the contract by his partner while evading his own obligations’.<sup>228</sup> Whether the way to factor in contractual forum selection clauses in treaty claims is to stay the proceedings or otherwise take these clauses into account when deciding on admissibility or the merits, depends on the circumstances of each case.<sup>229</sup> Once jurisdiction over a treaty claim has been upheld, the impact of forum selection clauses appears connected to ‘elementary notions of equity’<sup>230</sup>—including allowing both parties, not only the claimant, to rely on provisions of the contract and ‘that a party to a

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<sup>221</sup> Haersolte-Van Hof and Hoffmann (2008) 970. See also Gaillard (2005) 334.

<sup>222</sup> *SGS v Philippines* [163].

<sup>223</sup> See Shany (2003) 232 (quoting the PCIJ decision in the *Rights of Minorities* case); Resolution IDI (2003), [4(a)].

<sup>224</sup> See e.g. *Generation Ukraine* [20.30] (despite the absence of a requirement of exhaustion of local remedies, ‘the failure to seek redress from national authorities [may] disqualif[y] the international claim’).

<sup>225</sup> *Application Genocide Convention II* [120].

<sup>226</sup> *Nicaragua v Colombia* (2016) [72].

<sup>227</sup> *Aramco*, 183.

<sup>228</sup> *Ibid.*

<sup>229</sup> See *SGS v Philippines* [171] (relying on the *MOX Plant* case for the proposition that ‘international tribunals have a certain flexibility in dealing with questions of competing forums’).

<sup>230</sup> *Aramco*, 183.



contract cannot claim on that contract without itself complying with it'.<sup>231</sup> Neither the fact that the claimant is not the party to the contract nor the contract/treaty distinction should prevent the consideration of basic notions of party autonomy and interdependence of obligations, particularly whenever the treaty claim derives from the same facts or involves the same damages as claims under the contract.

### C Competing claims

The thesis also puts forward the existence of overlapping non-IIA claims as an admissibility factor.<sup>232</sup> As in the case of forum selection clauses and essentially for the same reasons, investment tribunals have given short shrift to local proceedings, whether potential or ongoing, dealing with the same facts as the international proceedings. Investment tribunals have required that suits before national courts be identical in certain respects to the international proceeding for arbitral jurisdiction to be affected. For instance, *Benvenuti & Bonfant* was not concerned with the contract/treaty distinction because ICSID jurisdiction was based on a contractual provision.<sup>233</sup> Yet in deciding whether to refer the case to a local court, the tribunal stated that 'the pendency of a case was in order only in the event of the identity of the parties, of the subject matter, and of the cause of the suits pending before the two tribunals'.<sup>234</sup> The fact that the parties in the local and international proceedings—although related—were not the same, sufficed to conclude that the conditions were not fulfilled.<sup>235</sup>

Subsequent decisions have referred to similar ideas of (lack of) identity between local and international proceedings. As noted, even the *Vivendi I* tribunal relied on the distinction between contract and treaty claims for jurisdictional purposes. The claimants had advanced that, had any domestic suit been brought, the respondent could have argued they had elected the local avenue and were thus precluded from pursuing international arbitration because of the 'fork in the road' provision.<sup>236</sup> The tribunal simply noted that a

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<sup>231</sup> Ibid

<sup>232</sup> See Chapter 2.

<sup>233</sup> *Benvenuti & Bonfant* [1.1].

<sup>234</sup> Ibid [1.14].

<sup>235</sup> Ibid [1.13-1.14]. Although *Benvenuti & Bonfant* precedes the modern discussion on contract and treaty claims, the decision noted that the claims were 'essentially based' on alleged breaches of the instrument invoked by the claimant. Ibid [1.16]. The terms 'essential' or 'fundamental' basis would 25 years later be introduced to investment arbitration by the *Vivendi I* annulment committee.

<sup>236</sup> *Vivendi I* [42].

contract claim by the claimant before local courts would not have foreclosed a treaty claim.<sup>237</sup> Similarly, also dealing with a ‘fork in the road’ argument, the *Enron* tribunal noted that any recourse to local courts for breach of contract would not have prevented an ICSID arbitration for treaty breaches and, moreover, ‘any situation of *lis pendens* would require identity of the parties’.<sup>238</sup> In a second jurisdictional ruling, the tribunal added that the contract claims/treaty claims distinction had ‘relied in part on the test of the triple identity’.<sup>239</sup> However, the tribunal suggested that, although apparently by definition contract and treaty claims involve different causes of action, there may be instances in which it is ‘virtually impossible’ to separate them.<sup>240</sup>

Arguments as to the lack of identity of the parties involved and the applicable law frequently reinforce the difference between local and international proceedings in terms of the cause of action, i.e., contract and treaty respectively. Indeed, in the local proceedings one of the parties may be the locally-incorporated entity—not the foreign shareholder, as in the arbitration—and the other party may be the public entity or territorial subdivision who concluded the contract, not the national state.<sup>241</sup> And, it is argued, while national courts will apply national law, international tribunals will decide based on the BIT and international law.<sup>242</sup> For the *EDF* tribunal, this ‘notable absence of the requisite parity relating to the parties, cause of action, and applicable legal standards’ between contract and treaty claims ‘precludes satisfaction of the identity requirement in *res judicata* or *lis pendens*’.<sup>243</sup>

As a rule, investment tribunals’ approach conforms with the PCIJ’s position under general international law in *Certain German Interests*. Poland had argued that the PCIJ could not entertain Germany’s application until the Germano-Polish Mixed Arbitral Tribunal had given judgment in a case brought by a company claiming restitution of the

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<sup>237</sup> Ibid [55].

<sup>238</sup> *Enron* (Jurisdiction I) [97]. See also Yannaca-Small (2008) 1026 (apparently approving investment tribunals’ ‘emerging caselaw’ on the impact of the contract claims/treaty claims distinction on fork in the road provisions).

<sup>239</sup> *Enron* (Jurisdiction II) [49].

<sup>240</sup> Ibid. According to the tribunal, this did not happen in the case. Ibid [51].

<sup>241</sup> See *Lauder* [161-163].

<sup>242</sup> *EDF* (Award) [1131]. Investment tribunals, however, may be required to apply national law along with international law. In turn, depending on the provisions of the relevant national legal system, national tribunals may be entitled and perhaps even required to apply a BIT and other international law provisions.

<sup>243</sup> Ibid [1132]. See also *SGS v Pakistan* [182].

same factory as the one involved in the case before the PCIJ.<sup>244</sup> The PCIJ observed that if ‘the plea were to be examined in accordance with the principles generally accepted in regard to *litispendance*’, it would have to be rejected.<sup>245</sup> After noting that the existence of the ‘doctrine of *litispendance*’ in international law was disputed,<sup>246</sup> it concluded that the ‘essential elements’ of litispendence were not present:

There is no question of two identical actions : the action still pending before the Germano-Polish Mixed Arbitral Tribunal at Paris seeks the restitution to a private Company of the factory of which the latter claims to have been wrongfully deprived; on the other hand, the Permanent Court of International Justice is asked to give an interpretation of certain clauses of the Geneva Convention. The Parties are not the same, and, finally, the Mixed Arbitral Tribunals and the Permanent Court of International Justice are not courts of the same character...

Thus, the two parallel claims were not identical as to the object, the parties, and the courts involved.

Yet in the *Chorzów Factory* case, the PCIJ revisited the issue in light of Poland’s argument that there were other tribunals before which the companies affected by the taking of the factory situated at Chorzów could claim compensation.<sup>247</sup> Poland argued that ‘by substituting itself for these companies’, Germany would upset the ‘jurisdictional system’ created by the treaties establishing such tribunals.<sup>248</sup> To resolve whether it was prevented from exercising its own jurisdiction because of the jurisdiction granted to the other tribunals mentioned by Poland, i.e., an admissibility question, the PCIJ observed that some of the reasons given in *Certain German Interests* still applied, in particular that the parties in the different proceedings diverged.<sup>249</sup> However, in *Certain German Interests* Germany only asked the Court for a declaratory judgment between states, while in *Chorzów Factory* it sought compensation ‘not necessarily different’ from that which the affected companies could obtain from another tribunal.<sup>250</sup> Here, the PCIJ did not content itself with observing that the claim before it was not identical to the claims that could be brought before other tribunals, under the criteria applied in *Certain German*

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<sup>244</sup> *Certain German Interests* (Preliminary Objections), 18-19.

<sup>245</sup> *Ibid*, 20.

<sup>246</sup> See also *American Bottle Company*, 437.

<sup>247</sup> *Chorzów Factory* (Jurisdiction), 5, 25.

<sup>248</sup> *Ibid*, 25.

<sup>249</sup> *Ibid*, 26.

<sup>250</sup> *Ibid*, 26-27.

*Interests*. Rather, the PCIJ examined in some detail the jurisdictional heads involved and concluded that the provisions in question were addressed to different kinds of acts.<sup>251</sup>

Thus, confronted with a concrete claim for indemnity the PCIJ undertook a more substantive comparison between potentially overlapping claims before asserting its jurisdiction. And the damages aspect was expressly considered for purposes of such comparison vis-à-vis claims before national courts.<sup>252</sup> Similarly, in *ELSI* the defining factor in determining whether the substance of the national proceedings was the same as that of the international proceeding were the measures and losses invoked, regardless of who the formal parties were or what the applicable law in each forum was.<sup>253</sup> Investment tribunals have not generally adopted this reasoning. Rather, they have focused on whether the claim's fundamental basis is a contract or a treaty and on whether the parties are formally identical.<sup>254</sup>

However, a substantive approach especially vis-à-vis the requirement that the parties be identical, which had been favoured by commentators as regards parallel treaty arbitrations,<sup>255</sup> is discernible in recent decisions dealing with shareholder indirect claims. This approach is consistent with the application of admissibility advanced in this thesis. For example, the *Ampal* case involved five related contractual and investment arbitrations with the same factual matrix.<sup>256</sup> In the decision on jurisdiction, the tribunal stated that, while as a 'jurisdictional matter' treaty and contract claims were different,<sup>257</sup> it was abusive for related parties to pursue the substance (i.e., the damages) of the same claim before two tribunals once the jurisdiction of each tribunal is confirmed.<sup>258</sup> The liability decision found that because IIAs allow shareholders to claim for losses to investments held indirectly through an investment company, the shareholder should be 'treated as a privy to the investment company for the purposes of the rule of *res judicata*'.<sup>259</sup>

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<sup>251</sup> Ibid, 27-32.

<sup>252</sup> Ibid, 26 ('[A]ny jurisdiction which the Polish Courts may have does not enter into account... [since] Poland has not argued that the Polish Courts have jurisdiction in regard to reparation.').

<sup>253</sup> *ELSI*, 45-46.

<sup>254</sup> See e.g. *Teco* [517].

<sup>255</sup> See Schreuer and Reinisch (2002) [237-239]; McLachlan (2008) 420; Brown (2011) 5.

<sup>256</sup> *Ampal* (Jurisdiction) [10, 328].

<sup>257</sup> Ibid [329].

<sup>258</sup> Ibid [330-331].

<sup>259</sup> *Ampal* (Liability) [260].

Shareholders should not benefit from ‘an extended right of direct action—looking through the investment company’, while at the same time not bearing ‘the burden of being bound by any finding arising out of a claim by the investment company itself on the same facts’.<sup>260</sup>

In assessing the impact of parallel proceedings, most investment tribunals look to the formal identity of claims.<sup>261</sup> This may be justified for strictly jurisdictional determinations, which are often taken before hearing the merits. Further, the duty of an international tribunal to exercise its jurisdiction should not be overlooked. But for admissibility decisions, an approach that focuses on the contract or treaty cause of action or the identity of the persons involved in the different claims is not warranted. In particular, when at least some investment tribunals have recognized that the subject matter of treaty and local claims may be the same even if the parties and applicable law differ.<sup>262</sup> IIAs potentially give standing to multiple persons with respect to the same measures and the same loss. If it is to have any meaning, an assessment of the similarities between related claims must concentrate on the two latter factors, regardless of whether the parallelism is between IIA claims or between an IIA claim and a national law claim.

### III. INTERACTIONS BETWEEN TREATIES AND CONTRACTS

Traditionally, international tribunals have examined contracts as ‘any other instrument open to judicial construction’.<sup>263</sup> Yet several decisions of investment tribunals have been influenced by conceptions advancing that ‘[c]ontract and treaty claims raise categorically different legal questions and require distinct factual analysis’.<sup>264</sup> As this thesis has emphasized, this view is often misguided, not least when contract and treaty claims refer to the same measures and damages. The legal questions are similar, given the applicability of both national and international law in investment arbitration and the interpretation of certain standards of treatment.<sup>265</sup> The factual analysis is also often similar, if not identical,

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<sup>260</sup> Ibid.

<sup>261</sup> See Schreuer (1976) 510-513.

<sup>262</sup> See e.g. *Lucchetti* (Award) [59]; *Teinver* (Jurisdiction) [132]; *Quiborax* (Provisional Measures) [131]; *İçkale* [262-263].

<sup>263</sup> Borchard (1915) 299.

<sup>264</sup> Sinclair (2013) 228. Sinclair, however, states that ‘the artificial disaggregation of the contractual and public international law elements of modern investment disputes inherent in the dichotomy of contract and treaty claims’. Ibid, 105.

<sup>265</sup> See Nolan and Baldwin (2006) 6; Chapter 7.

since it is generally recognized that both types of claims may arise from the same facts.<sup>266</sup> This section argues that treaty claims that include arguments of breaches of contractual provisions have in fact a mixed basis, i.e., contract and treaty, even if their fundamental basis is an IIA.

#### A The role of contracts in treaty claims

In treaty claims, investment tribunals interpret contracts, even those expressly subject to a different jurisdiction and some national law, as an incidental matter in deciding allegations of treaty breach.<sup>267</sup> However, when the treaty claim derives in whole or in part from contract breaches, describing the contract's role as 'incidental' results in minimizing its role and applying it selectively, ultimately affecting the correct resolution of the dispute. For example, in *Urbaser*, which involved the termination by the grantor of a public concession, the tribunal stated that because the claims were based on a BIT the termination's validity under the contract was of incidental relevance only.<sup>268</sup> However, the tribunal had previously observed that it had to examine whether the termination was justified under the contract because, otherwise, 'the declaration of termination itself [could not] constitute, in this respect, a breach of an obligation under the BIT'.<sup>269</sup>

Under general international law, in the decision on preliminary objections in *Certain German Interests*, the PCIJ addressed a Polish argument that the Geneva Convention granting jurisdiction to the Court was inapplicable by virtue of the provisions of the Treaty of Versailles.<sup>270</sup> Before affirming jurisdiction, the PCIJ observed that the Geneva Convention could not be applied without interpreting other international provisions.<sup>271</sup> Still, 'the interpretation of other international agreements [was] indisputably within the competence of the Court if such interpretation must be regarded as incidental to a decision on a point in regard to which it has jurisdiction'.<sup>272</sup> In the merits decision, the PCIJ applied a similar notion as regards national law. It examined German

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<sup>266</sup> See Gaffney and Loftis (2007) 27; Voss (2011) 165-166; *SGS v Pakistan* [147]; *Aguas del Tunari* [114].

<sup>267</sup> See *Ampal* (Jurisdiction) [255].

<sup>268</sup> *Urbaser* (Award) [947].

<sup>269</sup> *Ibid* [880]. See also *ibid* [1008].

<sup>270</sup> *Certain German Interests* (Preliminary Objections), 17.

<sup>271</sup> *Ibid*, 18.

<sup>272</sup> *Ibid*.

law ‘as an incidental or preliminary point’<sup>273</sup> to determine whether Poland had expropriated the rights, derived from certain contracts, two companies had in relation to a factory at Chorzów.<sup>274</sup>

With respect to international investment law, the *Vivendi I* tribunal stated that much of the evidence presented by the parties involved detailed contractual issues.<sup>275</sup> Hence, to determine whether the Province in question had acted as a sovereign or merely as a contracting party ‘a detailed interpretation and application of the Concession Contract’ was called for. This task, however, had been left by the parties to the local courts.<sup>276</sup> By contrast, the annulment committee asserted that exercising contractual jurisdiction is different from considering ‘the terms of a contract in determining whether there has been a breach of a distinct standard of international law’.<sup>277</sup> Before the decisions in *Vivendi I*, in *Klöckner*—where ICSID jurisdiction derived from a contract—the *ad hoc* committee referred to the powers of a tribunal vis-à-vis a contract different from the one granting jurisdiction. The *Klöckner* committee distinguished between applying the contract not containing the ICSID clause, which was beyond the tribunal’s jurisdiction, and taking that contract into account for interpreting and applying the contract that did contain the ICSID clause and otherwise understanding the dispute’s context.<sup>278</sup> The latter was permissible, even if the tribunal did not have jurisdiction in respect of the contract not providing for ICSID jurisdiction.<sup>279</sup>

Consistently with the views of the committees in *Klöckner* and *Vivendi I*, subsequent investment tribunals exercising treaty jurisdiction have affirmed their power to take into account relevant contracts ‘as an incidental matter’.<sup>280</sup> The *Total* tribunal observed that the treaty nature of the claims would not prevent, in the merits phase, an incidental examination of whether there had been breaches of the contractual framework

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<sup>273</sup> *Certain German Interests* (Merits), 42.

<sup>274</sup> *Ibid.*, 35-45.

<sup>275</sup> *Vivendi I* [79].

<sup>276</sup> *Ibid.*

<sup>277</sup> *Vivendi I Annulment* [105].

<sup>278</sup> *Klöckner Annulment* [52 (c)].

<sup>279</sup> *Ibid.*

<sup>280</sup> *EDF* (Jurisdiction) [155]; *Waste Management II* (Award) [73].

if this was relevant to ascertain alleged treaty breaches.<sup>281</sup> The *Bayindir* tribunal, while observing that its jurisdiction covered only treaty claims, added that it could, however, consider contract matters. It can and must do so to the extent necessary to rule on the treaty claims. It takes contract matters, including the contract's governing municipal law, into account as facts as far as they are relevant to the outcome of the treaty claims. Doing so, it exercises treaty not contract jurisdiction.<sup>282</sup> An investment tribunal should not exercise contractual jurisdiction absent consent of the parties, but the contract's terms may be taken into account 'in determining whether there has been a breach of a distinct standard of international law'.<sup>283</sup>

To what extent is there a difference between taking into account a contract's terms and exercising contractual jurisdiction when the damages are calculated on the basis of the income that would have resulted from the application of the contract's provisions, but for the measure in breach of the treaty? Admittedly, investment 'treaty' tribunals consider not only the contract terms but also the IIA. Alexandrov argued that in certain cases a tribunal formed under an IIA may have to first decide whether 'the underlying contract has been breached', before ruling on the treaty claims.<sup>284</sup> While the tribunal may have to perform 'a detailed and elaborate review of the contract and the rights and obligations arising from it', such exercise would be 'consistent with the long-established practice of international tribunals of interpreting contracts and national law when necessary to determine whether there has been a breach of international law'.<sup>285</sup> However, a finding of treaty breach premised on a prior finding of contract breach, in turn based on a 'detailed and elaborate review of the contract', is not truly independent.

Treaty tribunals should not necessarily refrain from considering the contract because it is subject to a different forum. It is impossible to decide whether there has been an interference with a contract in breach of international law 'without looking at the actual

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<sup>281</sup> *Total* (Jurisdiction), fn 50.

<sup>282</sup> *Bayindir* (Award) [135]. See also *Tenaris* [311]. The *Bayindir* tribunal also observed that a 'breach of contract is neither a necessary nor a sufficient condition for a breach of treaty'. *Bayindir* (Award) [139]. Aside from the position of national law, several IIAs expressly include any agreement concluded in relation to the investment as part of the applicable law. See Argentina-Belgium/Luxembourg BIT, Art 12. At least to the extent that the contract is part of the applicable law, the assertion that the tribunal takes it into account 'as facts' is incorrect.

<sup>283</sup> *Bayindir* (Jurisdiction) [171]. See also Haersolte-Van Hof and Hoffmann (2008) 969; *SGS v Pakistan* [186].

<sup>284</sup> Alexandrov (2006) 562.

<sup>285</sup> *Ibid.*



terms of the contract’.<sup>286</sup> Further, one can still conceptualize a ‘detailed and elaborate’ interpretation of the contract and even a finding of breach of contract not as an exercise of contractual jurisdiction but as an ‘incidental’ consideration of the contract necessary for the exercise of treaty jurisdiction.<sup>287</sup> But when a finding of contract breach is material in concluding that the treaty has also been breached—let alone if the damages are also based on the contract provisions—the contract/treaty distinction should not be used to deny the fundamental role of contracts in treaty claims. In these circumstances of considerable overlap between contract and treaty claims, treaty claims cannot be decided without comprehensively considering all the contract terms, including their application by the parties, and the law applicable to the contract.<sup>288</sup>

Siwy argues that treaty-based tribunals do not have jurisdiction to decide on a breach of contract, but may only ‘determine its existence as a preliminary step for a breach of treaty’.<sup>289</sup> Thus, they can only grant remedies for treaty breaches.<sup>290</sup> It is correct that a tribunal exercising treaty jurisdiction may only grant a remedy connected to a treaty violation. But, as Jennings observed regarding general international law, remedies in investment treaty arbitration are often ‘in substance partly contractual’,<sup>291</sup> at least in that damages granted by the treaty tribunal may be indistinguishable from the ones that may be granted by the contractual forum. This fundamental point applies even if the latter can grant certain remedies that may not be available to the treaty tribunal, such as punitive damages.<sup>292</sup> Remedies overlap between contract and treaty claims may not be complete. Still, what matters is whether the treaty tribunal is compensating all or part of the losses that may also be recovered through the contractual dispute resolution process.

Further, when the object of treaty claims refers substantively to remedies that correspond to contract breaches, treaty tribunals should not ignore agreed changes in the contractual relationship—even if they occur after the challenged measures—on the basis that they are contract issues or because the foreign investor was not directly involved. In

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<sup>286</sup> Jennings (1961) 165.

<sup>287</sup> *Perenco* (Jurisdiction and Liability) [325].

<sup>288</sup> See Chapter 7.

<sup>289</sup> Siwy (2017) 218.

<sup>290</sup> *Ibid.*

<sup>291</sup> Jennings (1961) 165.

<sup>292</sup> But see Siwy (2017) 218.

*Sempra*, the tribunal stated in the jurisdictional decision that the claim was ‘founded on both the contract and the Treaty’.<sup>293</sup> But it rejected a jurisdictional objection based on the existence of a renegotiation process between the local companies and the government.<sup>294</sup> Further, the award deemed an agreement on new contractual terms resulting from that process as not binding the shareholder claimant and not affecting the admissibility of the treaty claim, the issue of damages notwithstanding.<sup>295</sup> The tribunal’s approach to admissibility was in error. When the claim relies both on the treaty and the contract, either expressly or substantively, a finding of breach of contract may be a necessary precondition of a finding of treaty breach. Here the treaty tribunal in effect acts as a judge of both the treaty and the contract.<sup>296</sup> Thus, an agreed renegotiation of the contract affects the admissibility or the merits of the mixed contract/treaty dispute, even though the foreign investor is not party to the contract (nor, for that matter, to the renegotiation process).

## B Umbrella clauses

Umbrella clauses remain one of the most contested issues in investment arbitration. That they are interpreted differently is not surprising, since there is not one single umbrella clause but different provisions in different IIAs, sometimes disclosing considerable textual differences.<sup>297</sup> The interest here, however, is not in discussing which interpretative approach to umbrella clauses is preferable. The focus is on concepts that have emerged from the umbrella clause debates that are relevant for the contract/treaty distinction. These debates are fertile ground for present purposes, since umbrella clauses generally involve consideration of relations between contract and treaty rights and obligations.<sup>298</sup> The argument here is that, even if they transform contract claims into treaty claims, umbrella clauses should not have the effect of isolating the relevant claims from the contractual framework. Contractual obligations need to be interpreted and enforced in light not only

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<sup>293</sup> *Sempra* (Jurisdiction) [101].

<sup>294</sup> *Ibid* [107-113].

<sup>295</sup> *Sempra* (Award) [226-228].

<sup>296</sup> But see *Urbaser* (Award) [105].

<sup>297</sup> Crawford (2008) 355. Whether these differences explain the inconsistency in how tribunals interpret umbrella clauses is a different matter. See Schramke (2007) 19.

<sup>298</sup> But they may also refer to interactions between umbrella clauses and other international law obligations outside of the BIT. In the *CMS* annulment proceeding, CMS argued—regarding the umbrella clause—that ‘an investor might acquire an international law right to compliance with undertakings with regard to investments’. *CMS* (Annulment) [91]. See also *Eureko* [260].

of the proper law of the contract, but also of the extent to which both parties have complied with such obligations. The impact of umbrella clauses claims on contractual reciprocity and third parties must be considered.

Aside from the general reference by the tribunal in *Fedax*—which stated that under the umbrella clause in question Venezuela was obliged to ‘honor precisely the terms and conditions governing [the] investment’<sup>299</sup>—debates on the umbrella clause started with *SGS v Pakistan*. The tribunal asked itself whether the umbrella clause of the Pakistan-Switzerland BIT—which required each party to ‘constantly guarantee the observance of the commitments it has entered into with respect to the investments of the investors of the other Contracting Party’—‘transform[ed] purely contractual claims into BIT claims’.<sup>300</sup> The claimant had ‘characterized this clause as an “elevator” or “mirror effect” clause that takes breaches of contract under municipal law and elevates them immediately to the level of a breach of an international treaty’.<sup>301</sup> The tribunal was not convinced that this interpretation was sound.<sup>302</sup> The reasons included the text of the umbrella clause itself and that the legal consequences of such interpretation were ‘so burdensome in their potential impact’ that ‘clear and convincing evidence’ should have been adduced that that was the intention of the parties.<sup>303</sup> The umbrella clause had to ‘be read in such a way as to enhance mutuality and balance of benefits in the inter-relation of different agreements located in differing legal orders’.<sup>304</sup>

The *SGS v Philippines* tribunal disagreed with the position taken in *SGS v Pakistan*.<sup>305</sup> For the *SGS v Philippines* tribunal, ‘if commitments made by the State towards specific investments do involve binding obligations or commitments under the applicable law, it seems entirely consistent with the object and purpose of the BIT to hold that they are incorporated and brought within the framework of the BIT by [the umbrella

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<sup>299</sup> *Fedax* (Award) [29].

<sup>300</sup> *SGS v Pakistan*, 361.

<sup>301</sup> *Ibid* [163].

<sup>302</sup> Admittedly, while the *SGS v Pakistan* tribunal raised valid concerns as to an overly broad interpretation of the umbrella clause, it did not fully spell out what was, in its view, the correct interpretation. See generally Sinclair (2013) 224.

<sup>303</sup> *Ibid* [166-167].

<sup>304</sup> *Ibid* [168].

<sup>305</sup> *SGS v Philippines* [115].

clause]’.<sup>306</sup> This did not involve a ‘full-scale internationalisation of domestic contracts’, since the umbrella clause does not address the scope of the commitments but rather ‘the performance of these obligations, once they are ascertained’.<sup>307</sup> The law applicable to the contract is not changed<sup>308</sup> and the extent of the contractual obligations is determined by the terms of the contract.<sup>309</sup>

More recent decisions have followed either the approach of *SGS v Pakistan* or that of *SGS v Philippines*. The tribunal in *Eureko* found the latter persuasive.<sup>310</sup> But while the forum selection clause in the contract had a decisive impact in *SGS v Philippines*, it had no impact in *Eureko*. The tribunal rejected an admissibility objection relying on the contractual forum selection clause,<sup>311</sup> essentially because treaty claims had to be heard by the treaty tribunal.<sup>312</sup> The *El Paso* tribunal criticized the idea that under the umbrella clause contract claims are transformed into treaty claims, but that the ‘extent or content’ of the obligations are still to be assessed according to the law of the contract.<sup>313</sup> This tribunal could not understand why ‘a treaty claim should not be analysed according to treaty standards’.<sup>314</sup> The *CMS* annulment committee raised the issue of standing in this context. Under an umbrella clause not only the obligation’s content and proper law are not affected, but also ‘the *parties* to the obligation (i.e., the persons bound by it and entitled to rely on it) are likewise not changed’.<sup>315</sup>

In the end, the different positions adopted by investment tribunals on umbrella clauses disclose a theoretical disagreement as to how ‘independent’ umbrella clause claims are from the underlying obligation’s legal regime. Claims under umbrella clauses

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<sup>306</sup> Ibid [117].

<sup>307</sup> Ibid [126].

<sup>308</sup> Ibid. See also Schramke (2007) 23; Crawford (2008) 370.

<sup>309</sup> *SGS v Philippines* [127].

<sup>310</sup> *Eureko* [257].

<sup>311</sup> Ibid [92].

<sup>312</sup> Ibid [113]. The *Eureko* tribunal asserted that one of the effects of the umbrella clause was that ‘Eureko’s contractual arrangements with the Government of Poland are subject to the jurisdiction of the Tribunal’. Ibid [250]. This assertion does not leave much space for the *SGS v Philippines* tribunal’s observation that the ‘scope’ and ‘extent’ of the contractual obligations are still subject to the contract’s law and forum.

<sup>313</sup> *El Paso* (Jurisdiction) [76].

<sup>314</sup> Ibid.

<sup>315</sup> *CMS* (Annulment) [95 (c)]. See also *Azurix* (Award) [384]; *El Paso* (Award) [538]; *WNC* [334-335]; Siwy (2017) 216-217.

are treaty claims.<sup>316</sup> Yet the substance of the umbrella clause claim, i.e., the facts and losses invoked, may be the same or substantially the same as that of a claim under the relevant contract. On the one hand, this acknowledgement should weigh against the admissibility of umbrella clause claims together with other factors.<sup>317</sup> Identifying substantive overlaps between claims is a *sine qua non* to ‘enhance mutuality and balance of benefits in the inter-relation of different agreements located in differing legal orders’.<sup>318</sup> On the other hand, when the ‘elevated’ obligation mirrors an obligation in the underlying contract the *SGS v Philippines* tribunal’s assertion that an umbrella clause ‘does not convert questions of contract law into questions of treaty law’<sup>319</sup> is persuasive. It is one thing to elevate a contractual obligation to treaty level (or at least compliance thereof<sup>320</sup>); it is another to also isolate it from the legal regime in which it was created and was meant to operate. Not only the elevated obligation but also the rest of the contractual provisions—including compliance with them by both parties—and the contract’s proper law must remain relevant in a treaty claim based on an umbrella clause.<sup>321</sup>

Investment tribunals recognize that the claimant must be privy to the contract to put forward a contract claim.<sup>322</sup> Although the majority of tribunals also require contractual privity in umbrella clause claims relating to contractual obligations, here the position is less straightforward given the hybrid nature of these claims and the breadth of some umbrella clauses.<sup>323</sup> Still, even if an umbrella clause is interpreted as allowing investors to invoke contractual obligations to which they are not privy, in that case a non-party exercises substantively the same rights as may be exercised by the party to the contract. This requires considering not only risks of double recovery and inconsistent outcomes, but also that a shareholder is enforcing the company’s rights while, in principle, not being

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<sup>316</sup> Gaffney and Loftis (2007) 26; Voss (2011) 275; Sinclair (2015) 958.

<sup>317</sup> See Chapter 2.

<sup>318</sup> *SGS v Pakistan* [168].

<sup>319</sup> *SGS v Philippines* [126].

<sup>320</sup> One of the early ideas Weil advanced was that treaty provisions could ‘transform the obligation to respect the contract into an international obligation *stricto sensu*’. Weil (1961) 123-124.

<sup>321</sup> See *SGS v Philippines* [126]; Douglas (2009) 213; Hobér (2014) 373.

<sup>322</sup> *Tenaris* [305].

<sup>323</sup> Sinclair (2015) 958. But see *WNC* [335] (upholding ‘the requirement of privity even for generally worded umbrella clauses’).

bound by the latter's obligations.<sup>324</sup> This is inconsistent with the contractual balance.<sup>325</sup> It may also affect third parties to the extent, for example, that the umbrella clause claim by a shareholder may prevent the company from enforcing the contract claims. If contractual rights are elevated through an umbrella clause, the analysis must elevate the rest of the provisions of the contract too. The admissibility or merits of an umbrella clause claim should be assessed considering the extent to which both parties to the contract have complied with their obligations and whether persons not involved in the IIA claim, including the parties to the 'elevated' contract, may be affected.

### C Privity without obligations?

While certain investment treaty tribunals have expressly recognized that a contract lay 'at the heart of th[e] dispute',<sup>326</sup> investment claims largely proceed on the theory that treaty rights and obligations 'have an independent basis from rights and obligations deriving from the contract, and may as such – in principle – not be affected by contractual provisions dealing only with contractual rights and obligations.'<sup>327</sup> But more often than not the argument that contract and treaty claims involving the same contract are substantively independent is incorrect. This raises the relationship between the contract's rights and obligations. Even leaving aside umbrella clauses, for instance legitimate expectations can enable investors<sup>328</sup> to substantively rely in a treaty claim on the provisions of a contract concluded by a local subsidiary. In that case, first, can the claim be resolved ignoring the private party's obligations under the contract? Second, should the investor be allowed to escape from any counterclaim simply on the basis that the counterclaim sounds in contract and is therefore not a 'treaty' claim?

Non-compliance by the foreign investor with contractual obligations, in the context of a treaty claim, was a central issue in *Oxy II*. The claimants relied both on the provisions of the Ecuador-US BIT and those of a contract concluded between one of the

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<sup>324</sup> *CMS (Annulment)* [95 (d)].

<sup>325</sup> Schramke (2006) 257; Voss (2011) 274.

<sup>326</sup> *Suez ARB/03/19 (Liability)* [66]. The tribunal, however, also noted that 'BIT claims and contractual claims are two different things'. Ibid [43].

<sup>327</sup> *Abaclat* [379]. While the *Abaclat* tribunal advanced that the claims were 'based on alleged breaches by Argentina of the BIT and not on contractual rights', it also acknowledged that these claims 'relate[d] to the [contracts]'. Ibid [498].

<sup>328</sup> See *Suez ARB/03/17 (Liability)* [212] (the relevant contract 'reflect[ed] in detail the Claimants' legitimate expectations').

claimants and Ecuador through its national oil company.<sup>329</sup> Central to the case was whether Ecuador had validly terminated the contract under its terms and applicable Ecuadorian law.<sup>330</sup> Any transfer of rights under the contract required prior authorization from the Ecuadorian authorities, with a non-authorized transfer being a ground for termination.<sup>331</sup> The tribunal found that by transferring contractual rights without such authorization the relevant claimant had breached the contract and provisions of Ecuadorian law.<sup>332</sup> But despite these findings that the foreign investor had breached the contract and the law<sup>333</sup> and that the violation was expressly provided as a ground for rescission,<sup>334</sup> the tribunal concluded that the termination of the contract was not in the circumstances ‘a proportionate response’ and was thus in breach of Ecuadorian law, customary international law, and the IIA.<sup>335</sup>

In *Venezuela Holdings*, which concerned two oil development projects in Venezuela involving joint venture agreements and related national law provisions,<sup>336</sup> the tribunal stressed the need to carefully distinguish treaty from contract claims.<sup>337</sup> Thus, a contractual provision limiting compensation was discarded as inapplicable to state liability by virtue of treaties.<sup>338</sup> No limitations on contractual liability could be ‘transmuted into limitations of the State’s responsibility under international law’.<sup>339</sup> Yet at least some of the measures in question were found to violate the BIT simply because, by not respecting certain requirements of the contractual framework, ‘they were incompatible with the Claimants’ reasonable and legitimate expectations’ and had thus breached the fair and equitable treatment standard.<sup>340</sup>

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<sup>329</sup> *Oxy II* (Award) [1, 2, 105, 115].

<sup>330</sup> *Ibid* [297].

<sup>331</sup> *Ibid* [340-341].

<sup>332</sup> *Ibid* [317, 331, 381].

<sup>333</sup> See also *ibid* [437].

<sup>334</sup> *Ibid* [672].

<sup>335</sup> *Ibid* [452].

<sup>336</sup> *Venezuela Holdings* (Award) [45-85].

<sup>337</sup> *Ibid* [254].

<sup>338</sup> *Ibid* [218, 254].

<sup>339</sup> *Ibid* [218].

<sup>340</sup> *Ibid* [263-264].

A specific aspect involving treaty claims and contractual obligations refers to counterclaims. At the dawn of investment treaty arbitration, Paulsson observed that in this form of dispute resolution the lack of contractual privity was not an obstacle for claimants to sue, although it prevented defendant states from bringing arbitrations or even counterclaims.<sup>341</sup> Investment treaty tribunals have so far generally not accepted counterclaims by states, often on jurisdictional grounds.<sup>342</sup> To the extent the tribunal's jurisdiction is based on the treaty and given that BITs normally contain obligations only for the host state, a counterclaim by the latter invoking contractual or national law provisions is considered inadmissible.<sup>343</sup> Yet the solution depends on the interplay between, first, the IIA provision conferring jurisdiction to the tribunal.<sup>344</sup> Broad provisions encompassing disputes related to the investment seem to allow counterclaims based on contract or national law, while with jurisdiction provisions including only IIA breaches the position is much more doubtful.<sup>345</sup> Second, the contents of the applicable arbitration rules and whether they authorize counterclaims.<sup>346</sup> And third, whether the investor claimant may be said to have consented to counterclaims, through its acceptance of the IIA's arbitration offer or otherwise.<sup>347</sup>

Thus, 'arbitration without privity' resulting from IIAs routinely involves investors substantively relying to varying degrees on contractual rights<sup>348</sup>—whether or not they are parties to the contract—despite the treaty nature of the claims. The role of contractual obligations in treaty claims, however, is less clear. Even a serious repudiation by the

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<sup>341</sup> Paulsson (1995) 232.

<sup>342</sup> See *Rusoro* [628]; *Paushok* [684-699]. But see *Goetz II* [276-287]; *Urbaser (Award)* [1143-1221] (affirming jurisdiction over the counterclaim but rejecting it on the merits).

<sup>343</sup> In *Saluka*, the tribunal left open the issue of lack of identity between the parties to the counterclaim and those to the primary claim (a likely occurrence in the contract/treaty context). The counterclaim was rejected *inter alia* due to its contractual nature and the effect of a forum choice provision in the relevant contract. *Saluka* [45-83].

<sup>344</sup> Although to a lesser extent than jurisdiction provisions, the IIA's applicable law provision (if any) may also be relevant to the admissibility of counterclaims. On jurisdiction and applicable law provisions see Chapter 7.

<sup>345</sup> Douglas (2009) 257; Dudas (2017) 396.

<sup>346</sup> Article 46 of the ICSID Convention provides for counterclaims in broad terms. The application of article 19(3) of the (1976) UNCITRAL Arbitration Rules in treaty claims is less straightforward. See Douglas (2009) 257-260; Kryvoi (2011) 8.

<sup>347</sup> Dudas (2017) 403-404.

<sup>348</sup> Contractual rights are routinely granted protection by investment tribunals either under express treaty provisions as protected investments or under more general notions. See *Enron (Award)* [154]; *Paushok* [202].



private party of a contractual requirement probably does not affect the treaty claim, although the host state could still be held liable based on the investor's legitimate expectation that the contract be performed. Treaty claims relating to contractual breaches are admissible, but counterclaims referring to the same contract apparently not. In this respect, some commentators argue that IIAs' substantive and jurisdictional provisions are intended to protect investors not states, the latter having other avenues to pursue their claims (including national courts).<sup>349</sup>

The asymmetry is unsatisfactory, however. A claim may be characterized as having a treaty as its fundamental basis for jurisdictional purposes. But if the claim is in substance (at least partly) based on the host state's (or one of its agencies) contractual obligations, the other side of the coin must be accorded equal weight. An investment tribunal must assess alleged breaches by the host state of the contractual framework simultaneously with potential breaches of the contract by the other party (regardless of whether the latter is the claimant in the treaty claim). Keeping separate the state's obligations under the contract, as giving rise to treaty claims, and the private party's obligations, as only allowing contract claims, is unsustainable. It entails a biased approach to the contract that is not warranted by the protection of contractual rights under IIAs. Interpreting IIAs as isolating the contract's private party's rights from its obligations results in the protection of a contract that the contractual parties did not agree to.

Regarding counterclaims, in *Harza* the Iran-US Claims Tribunal had to consider 'whether a claimant that owns its claim indirectly is shielded jurisdictionally from counterclaims that could otherwise have been brought against the direct owner of the claim'.<sup>350</sup> It held that it was not because while

claims against a corporation ordinarily may not be asserted against its shareholders, it also is true that shareholders such as the Claimants ordinarily may not assert claims belonging to their corporation. To the extent that the Claims Settlement Declaration provides otherwise and permits shareholders to raise corporate claims, equity requires that they take such claims subject to the defenses and counterclaims that could have been raised as against the corporation.<sup>351</sup>

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<sup>349</sup> Dudas (2017) 385-386.

<sup>350</sup> *Harza* [85].

<sup>351</sup> *Ibid* [86].

The point in *Harza* was one of standing,<sup>352</sup> yet the same rationale applies to cause of action questions. If shareholders are allowed to raise via treaty claims the substance of contract claims, equity requires that defences stemming from the contract be considered by the treaty tribunal. Even if the IIA jurisdiction clause only covers treaty claims, when the applicable law provision includes national law or agreements concluded in relation to the investment, it is too formalistic to say that the investment tribunal may not allow counterclaims based on national law or contractual provisions in resolving the investment dispute. Further, by lodging a treaty claim stemming from breaches of contract the investor may be said to have consented to counterclaims based on the same contract.<sup>353</sup>

#### IV. CONCLUSION

The observation that ‘whether there has been a breach of the BIT and whether there has been a breach of contract are different questions’ is, as a general matter, correct.<sup>354</sup> After all, contracts and treaties are in principle independent instruments of a different ‘legal character’,<sup>355</sup> generally subject to national and international law respectively, containing different provisions with dissimilar legal standards.<sup>356</sup> But the point is to what extent the answers to these different questions overlap, not least in the context of treaty claims involving contracts. After the foundational annulment decision in *Vivendi I*, investment tribunals have clearly tended to see contract and treaty claims as ‘different things, responding to different tests, subject to different rules’, both for purposes of jurisdiction

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<sup>352</sup> See also *Ampal* (Liability) [266] (since shareholders are entitled to pursue claims for investments held through a corporation, they ‘must also be subject to defences that would be available against the corporation’).

<sup>353</sup> Consent to counterclaims generally is also present when the investor chooses to commence its claim under arbitration rules that provide for counterclaims. See *Roussalis* (Dec, Reisman); Kryvoi (2011) 10; Bravin and Kaplan (2012) 7.

<sup>354</sup> *Vivendi I Annulment* [96]. To the extent this idea relies on an allegedly clear separation of the law applicable to contract and treaty claims, however, it is questionable.

<sup>355</sup> *SGS v Philippines* [142].

<sup>356</sup> Schreuer (2005) 295.

and merits.<sup>357</sup> Only for damages purposes have some tribunals recognized substantive overlaps between contract and treaty claims.<sup>358</sup>

Maintaining a strict conceptual separation between the two types of claims may not be particularly problematic for jurisdictional purposes. Here decisions will often be taken before considering the merits of the case, mainly based on (mostly international) instruments granting consent to jurisdiction, and having in mind the need for an international tribunal to exercise jurisdiction whenever warranted.<sup>359</sup> However, the situation is different when it comes to admissibility or the merits. First, the alleged independence of treaty claims vis-à-vis contract claims largely depends on the concept of the ‘fundamental’ or ‘essential’ basis of the claim. But this is a fluid concept, which no tribunal has so far defined with any precision.<sup>360</sup> While it is a useful notion for jurisdictional determinations, it does not sustain a complete conceptual independence beyond that. Second, whenever there is considerable overlap in terms of substance between contract and treaty claims, which is possible as investment tribunals recognize – i.e., because the facts coincide, the state measures or the damages in question are the same, etc.—such conceptual independence appears even less warranted. Theoretical (and rather underdeveloped) concepts should not be applied to the point of obscuring such substantive overlaps.

The approach taken by the Chamber of the ICJ in *ELSI*—i.e., while affirming jurisdiction, focusing on the substance of the claim for other purposes—is preferable. Otherwise, the theoretical foundations of some of the main concepts in investment arbitration appear questionable. Further, their application may lead to unfair outcomes. Thus, contracts function (directly or indirectly) as possible sources of rights but not of obligations for investors, an agreed forum selection clause in the contract has a bearing neither on jurisdiction nor on the merits, a renegotiation of the relevant contract following

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<sup>357</sup> Subsequent decisions may have read too much, in terms of independence between contract and treaty claims, into the annulment decision in *Vivendi I*. This decision was not dealing with the merits of the case, yet it suggested that certain contractual aspects might be relevant ‘in assessing whether there has been a breach of the treaty’. See *Vivendi I Annulment* [101, 110, 113].

<sup>358</sup> Even at the damages stage this recognition remains relatively rare, unsystematic, and with elusive implications. And, by definition, it comes too late for purposes of assessing the state’s liability under international law.

<sup>359</sup> See *Total (Jurisdiction)* [83] (a contractual choice of forum cannot prevent the performance by an investment tribunal of its obligations in an IIA arbitration).

<sup>360</sup> To this one should add the lack of consensus as to the additional element that transforms a contract breach into a treaty violation.

the adoption of the impugned measures may have no significant impact on the claims, etc. All this being due to the treaty nature of the claims and their alleged autonomy vis-à-vis contract claims.

Acknowledgement of the (sometimes considerable) overlaps between the substance of contract and treaty claims should result in investment tribunals giving due weight to all the terms of the contract, rather than only to those conferring rights to the investor, and in considering to what extent both parties have complied with the contract. For purposes of the thesis, these overlaps determine to what extent factors such as the existence of parallel local proceedings, forum selection provisions in contracts, and settlements or waivers (even if not expressly applicable to treaty claims) may affect the admissibility of shareholder indirect claims under IIAs. When treaty claims have in fact a mixed basis—i.e., a treaty and contract basis, even if the former prevails—such factors are relevant to admissibility along with other considerations.

## 7 *Applicable Law*

We are not embarrassed by any technicalities of municipal law.<sup>1</sup>

Shareholder indirect claims under IIAs are based on assets that belong to the company under national law and that are subject to their own national legal regimes. Thus, both national and international law are necessarily relevant to the resolution of these claims. The applicable law in investment arbitration has been the subject of considerable scholarly and jurisprudential debates.<sup>2</sup> To a large extent, discussions have focused on the interplay between national and international law. One of the most difficult issues in international investment law is precisely the function of national law.<sup>3</sup> The latter is generally not a formal source of law<sup>4</sup> for tribunals operating under general international law.<sup>5</sup> In *Certain German Interests*, the PCIJ assessed the compatibility of a Polish law affecting property of German nationals or of companies controlled by them and a Geneva Convention of 1922 providing protection to such property.<sup>6</sup> The Court observed that '[f]rom the standpoint of International Law and of the Court which is its organ, municipal laws are merely facts which express the will and constitute the activities of States'.<sup>7</sup>

Whether referring to national law as a fact adequately captures the different purposes it may serve under general international law,<sup>8</sup> an international tribunal may conclude 'that

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<sup>1</sup> Landreau, 367.

<sup>2</sup> See generally Sasson (2010); Kjos (2013); Ketcheson (2013); Ho Qing Ying (2014); Grisel (2014); Spiermann (2015); Sasson (2017); Hepburn (2017).

<sup>3</sup> The terms 'national law', 'municipal law', 'internal law', 'local law', and 'domestic law' are used interchangeably throughout this thesis. Terminology varies in this respect. For instance, the ILC Articles settled for the term 'internal law'. ILC Commentaries 38. National law encompasses any legal norm emanating from any organ of the state, including the central government and any territorial unit.

<sup>4</sup> Sources refers here to 'formal sources', i.e., the procedures through which rules of international law are created. See Pellet (2006) 714; Grisel (2014) 215; Dupuy (2016).

<sup>5</sup> Pellet (2006) 717. National law contributes to the formation of 'general principles of law' in Article 38(1)(c) of the ICJ Statute, under one of the most widely accepted definitions referring to principles of law generally recognized by national legal systems. Daillier, Forteau, and Pellet (2009) 382. But when general principles of law are applied, it is these principles and not any national law *per se* the source of international law.

<sup>6</sup> *Certain German Interests* (Merits), 19-24, 34, 81.

<sup>7</sup> Ibid, 19.

<sup>8</sup> Regarding international investment law, Crawford argued that given that 'the standard applicable law clause in BITs (however it may be formulated) mandates and may even require the tribunal to apply the law of the host state alongside international law... it cannot be argued that the law of the host state is a mere

it is necessary to apply the municipal law of a particular country'<sup>9</sup> and that it may be 'bound to apply municipal law when circumstances so require'.<sup>10</sup> For example, the *ELSI* case required consideration of national law both for admissibility and merits aspects. The ICJ's Chamber observed that 'a question of municipal law [may be] essential to the Court's decision in a case'.<sup>11</sup> The PCIJ case of *Serbian Loans* revolved around the 'monetary bases' on which the principal and interest of certain loans issued by the Kingdom of the Serbs, Croats and Slovenes should be paid.<sup>12</sup> The PCIJ observed that the dispute was 'exclusively concerned' with relations subject to national law.<sup>13</sup>

If these statements somehow reflect the position under general international law, they apply *a fortiori* in investment arbitration.<sup>14</sup> Unlike other areas of international law where the relevance of national law is not always readily apparent, in international investment law 'the relationship between the investor and the host State is governed in the first instance by national law'.<sup>15</sup> The relevance of the law of the territory in which the investment is made is linked to the requirement in many IIAs that the investment be made in the territory of the host state.<sup>16</sup> Further, national law is often expressly part of the applicable law chosen by the parties through IIA provisions. However, arbitral tribunals vary in how they give effect to national law in the resolution of investment disputes, both as to jurisdiction and the merits. Of particular interest here are the consequences in terms of the applicable law of substantive overlaps between treaty and contract/national law

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matter of fact.' Crawford (2008) 352-353. See also Grisel (2014) 222; Sasson (2017) 297-298; Hepburn (2017) 105-108; *SPP* (Jurisdiction II) [58]. But see *AES Summit* [7.6.6]; *Electrabel* [4.127-4.129].

<sup>9</sup> *Brazilian Loans*, 124.

<sup>10</sup> *Ibid.* In *Serbian Loans* and *Brazilian Loans*, the applicable law was 'purely' national because of the terms of the parties' special agreements and the object of the disputes. See *ibid.*, 94, 123. It is still noteworthy that the PCIJ, as an international court, 'did not see fundamental obstacles to jurisdiction over debt instruments governed by municipal law'. Waibel (2011) 60, 62. As discussed below, the two aspects, i.e., the terms of the agreements to arbitrate and the object of investment disputes, also determine national law's relevance in investment arbitration.

<sup>11</sup> *Ibid.*, 47. The PCIJ observed that in *Certain German Interests* it found, 'from the standpoint of municipal law', that a right of ownership had been 'validly acquired', which constituted a 'condition essential to the Court's decision'. *Interpretation of Judgments Nos. 7 and 8*, 20.

<sup>12</sup> *Serbian Loans*, 6.

<sup>13</sup> *Ibid.*, 18. Pellet argues that when *Serbian Loans* was decided 'the *chapeau* of Art. 38 did not include the phrase expressly defining the function of the Court as the application of international law' and that the ICJ likely would have expressed a different reasoning as to the application of national law. Pellet (2006) 720. Yet he recognizes that there have been cases before the PCIJ and the ICJ 'where domestic law issues were relevant'. *Ibid.* See also Bartels (2011) 134.

<sup>14</sup> See Hepburn (2017) 105.

<sup>15</sup> History ICSID Convention, II-1, 571.

<sup>16</sup> Knahr (2015) 590. See also Douglas (2014) 373.

claims. Both categories of claims often stem from the same facts and require consideration of whether the same national law instruments have been breached (although in the case of IIA claims the analysis does not stop there).

This chapter examines the law applicable to IIA claims and ultimately to the admissibility of shareholder indirect claims. The latter are in substance mixed national law/international law claims that require a meaningful application of both legal systems. In their admissibility determinations, investment tribunals may consider legal reasons stemming from national and international provisions and proceedings. This is because, first, the applicable law in investment arbitration is not limited to the IIA but also includes general international law and national law. Second, the law of the state where the company is constituted is relevant to determine the scope of shareholder rights, along with the IIA and general international law.<sup>17</sup> Third, given investment claims' mixed cause of action,<sup>18</sup> arbitral tribunals should not overlook the effects on the national plane. This will not only entail a more comprehensive consideration of all sources of international investment law, but also furnish safeguards against double recovery risks and prejudice to third parties.

This chapter first analyses the applicable law in investment arbitration generally. Second, it surveys the role of national law in respect of investment tribunals' jurisdiction and the substance of investment claims. Third, the chapter discusses the law applicable to the admissibility of shareholder claims under IIAs.

## I. APPLICABLE LAW IN INVESTMENT ARBITRATION

### A The sources of international investment law

#### 1 *Overview*

The law applicable for the resolution of disputes between foreign investors and host states often results from provisions in IIAs and international arbitral rules. However, IIAs themselves frequently do not contain a specific provision establishing the law that must be applied to resolve disputes covered by the treaty.<sup>19</sup> Yet even in that case, first, the relevant arbitral rules may contain a default solution. This is the case of Article 42 of the

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<sup>17</sup> See Chapter 4.

<sup>18</sup> See Chapter 6.

<sup>19</sup> Banifatemi (2010) 197; Sasson (2017) 274.

ICSID Convention. Second, the applicable law will also result, alone or in combination with the applicable law provision, from the IIA's jurisdiction clause establishing the kinds of disputes that may be submitted to investor-state arbitration.<sup>20</sup> A jurisdiction clause establishing arbitral jurisdiction over disputes under the IIA provisions calls for the application of, at least, the treaty and general international law.<sup>21</sup> Broader jurisdiction provisions may require the application of additional legal systems.<sup>22</sup> For example, IIA provisions establishing jurisdiction generally over 'investment disputes' in principle empower the tribunal to apply international and national law.<sup>23</sup> Finally, the application of international law and national law may derive from IIA provisions other than jurisdiction and choice of law ones. These include provisions referring to national law to determine who may be considered nationals of the IIA's parties<sup>24</sup> or in the definition of the protected investments,<sup>25</sup> and to international law to define the scope of certain standards of treatment.<sup>26</sup>

Yet, while different IIA provisions may bear on the law investment tribunals must apply, claims can only be based on norms included in the jurisdiction clause, not on those included only in an applicable law provision.<sup>27</sup> This is a function of the type of disputes over which a tribunal may rule in accordance with its mandate.<sup>28</sup> Further, an international tribunal's ultimate findings may only be whether, under the norms in the jurisdiction clause, it has jurisdiction, the claims are admissible, and any breach of such norms has occurred (and what are the consequences thereof). In principle, the norms included only in the applicable law clause and not in the jurisdiction one may not be part of such findings.<sup>29</sup> But they must be part of the stepping stones to get there.

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<sup>20</sup> Bartels (2011) 115. See also Bartels (2001) 502.

<sup>21</sup> *MTD (Annulment)* [61].

<sup>22</sup> An 'implicit agreement' on the applicable law may 'be deduced from the facts and circumstances of the relationship between the parties'. History ICSID Convention, II-1, 570.

<sup>23</sup> See *Iberdrola (Award)* [301-309, 349].

<sup>24</sup> See Art 1(2)(a) Romania-Sweden BIT.

<sup>25</sup> See Art 1(2) Jamaica-Spain BIT; Grisel (2014) 223.

<sup>26</sup> See Art 1105(1) NAFTA.

<sup>27</sup> Bartels (2011) 124.

<sup>28</sup> See *Application Genocide Convention I* [147].

<sup>29</sup> *MOX Plant* [19]; *Eurotunnel* [152].



Article 42, paragraph 1, of the ICSID Convention provides the law to be applied by an ICSID tribunal<sup>30</sup> in the following terms:

The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.<sup>31</sup>

No limits are established as to what the parties may agree.<sup>32</sup> With respect to the first sentence, it has been noted that the reference to ‘rules of law’ gives the parties more flexibility and allows them to combine rules of different legal orders.<sup>33</sup>

Regarding the second sentence, the law of the state party to the dispute and international law together constitute the applicable law.<sup>34</sup> Several negotiators of the ICSID Convention, as well as the first ICSID decisions, took the view that under this provision international law’s role was essentially to ‘fill the gaps in the applicable national law or to correct any inconsistencies between it and international law’.<sup>35</sup> Different theories were advanced to try to conceptualize this role,<sup>36</sup> although the ultimate primacy of international law was generally accepted.<sup>37</sup> These theories, however, prompted criticisms. Weil challenged conceptions seeking to ‘minimize the scope of the explicit reference to international law’ in the ICSID Convention.<sup>38</sup> These attempts served no purpose

for no matter how domestic law and international law are combined, under the second sentence of Article 42(1), international law always gains the upper hand and ultimately prevails. It prevails indirectly through

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<sup>30</sup> Spiermann argues that ‘Article 42 of the ICSID Convention has been designed for purposes of contract claims’. Spiermann (2015) 1378. The basis for this assertion is not clear. See Sasson (2017) 297.

<sup>31</sup> ICSID Convention, Art 42(1).

<sup>32</sup> See Crook (1989) 284.

<sup>33</sup> Shihata and Parra (1994) 189; Kreindler (2005) 172.

<sup>34</sup> Report of the Executive Directors [40].

<sup>35</sup> Shihata and Parra (1994) 202.

<sup>36</sup> See e.g. the *Klöckner* annulment committee’s reference to the principles of international law’s ‘dual’ role, ‘complementary’, and ‘corrective’. *Klöckner Annulment*, 112. This categorization was somewhat criticized by the second arbitral tribunal in *Amco*, although as, the *Klöckner* committee, this tribunal also stressed that ICSID tribunals should apply first national law and then international law. *Amco II* (Award), 580. See also Broches (1972) 390; Grisel (2014) 216; *Aucoven* (Award) [102].

<sup>37</sup> Broches (1972) 392.

<sup>38</sup> Weil (2000) 407. See also generally Gaillard and Banifatemi (2003).

the application of domestic law where the latter is deemed consistent with international law or incorporates it. It prevails directly where domestic law is deemed deficient or contrary to international law.<sup>39</sup>

Weil advanced that Article 42(1)'s reference to national law, even when limited to ascertaining its compatibility with international law, was 'a pointless exercise, the sole *raison d'être* of which is to avoid offending the sensibilities of the host State.'<sup>40</sup>

ICSID tribunals have not adopted Weil's suggestion that the reference in Article 42(1) to national law is irrelevant.<sup>41</sup> Whatever the view on precisely how national and international law should combine in this context, the second sentence of this paragraph 'contains a clear decision in favour of the host State's law'.<sup>42</sup> There are no qualifications here as to the duty of ICSID tribunals to apply this—and not other<sup>43</sup>—national law.<sup>44</sup> The alleged irrelevance of national law was partly based on the idea that international law 'is sufficiently complete to provide a legal answer to every [investment] dispute'.<sup>45</sup> But despite the development of international investment law, current views suggest that, particularly when a contract is involved, completely excluding the application of national law is 'impractical'.<sup>46</sup> On the other hand, ICSID tribunals are also required to apply 'such rules of international law as may be applicable'. While the interpretation of these words may be debated, at the very least they grant tribunals some degree of appreciation as to which are the applicable international law rules.<sup>47</sup>

It is nowadays suggested that, in particular after the annulment decision in *Wena*, a 'pragmatic' approach should be adopted, 'allowing for the application of both domestic law and international law if the specific facts of the dispute so justifies'.<sup>48</sup> In *Wena*, the *ad hoc* committee advanced that under the second sentence of Article 42(1) both national

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<sup>39</sup> Weil (2000) 409.

<sup>40</sup> Ibid.

<sup>41</sup> But cf *Santa Elena*, [65].

<sup>42</sup> Schreuer (2009) 595.

<sup>43</sup> The decision not to allow tribunals to choose any national law but to apply the host state's law (ibid, 616), indicates the importance the negotiators expected this law would have in ICSID arbitration.

<sup>44</sup> A failure to apply the applicable law is a ground for annulment under Article 52 of the ICSID Convention. See e.g. *MINE*, 104. This is a further reason for ICSID tribunals not to say that the host state's law is irrelevant under Article 42(1), second sentence.

<sup>45</sup> Weil (2000) 408.

<sup>46</sup> Schreuer (2009) 562.

<sup>47</sup> Cf Gaillard and Banifatemi (2003) 408. See also Kulick (2012) 17.

<sup>48</sup> *CMS* (Award) [116].

and international law were relevant.<sup>49</sup> National law—in this context the law of the host state—‘can indeed be applied in conjunction with international law if this is justified’ and ‘international law can be applied by itself if the appropriate rule is found in this other ambit’.<sup>50</sup> The role of each legal order depends on the dispute’s nature and on which element of it is being considered,<sup>51</sup> as the investment tribunal determines.<sup>52</sup> This approach has been described simply as entailing a concurrent application of national and international law.<sup>53</sup> Investment tribunals have abandoned prior attempts to conceptualize, not least in any refined way, the respective roles of national and international law under the second sentence of Article 42(1). The ‘pragmatic’ approach, moreover, seems to have found support with some commentators.<sup>54</sup>

Affirming generally the application of both national and international law gives less prominence to the host state’s law than the first ICSID decisions, which referred to the need to look first to national law and then to international law.<sup>55</sup> This may be related to the growth in treaty disputes, rather than contractual ones. The role of international law is generally greater in disputes brought under treaties—even if also involving contracts—than in purely contractual disputes.<sup>56</sup> However, investment treaty tribunals have not, as noted, endorsed the position that essentially confined national law to irrelevance. Yet even if national law remains relevant and applicable in treaty disputes, the question is relevant for what? Is national law equally a potential source of rights and expectations for the investor as well as of obligations for the latter in treaty claims? If this is not the case, host states may be in a worse position than under Weil’s proposal—i.e., exclusive application of international law for the resolution of investment disputes—. Whether the applicable international law is more favourable for the investor or the host state depends on the circumstances of each case.<sup>57</sup> But if the host cannot rely on its law as a source of obligations for the investor or as relevant in challenging the substance of treaty claims,

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<sup>49</sup> *Wena* (Annulment) [40].

<sup>50</sup> *Ibid.*

<sup>51</sup> *Azurix* (Award) [66]; *Teco* [469].

<sup>52</sup> Kulick (2012) 35.

<sup>53</sup> Schreuer (2009) 628.

<sup>54</sup> Gaillard and Banifatemi (2003) 404-411; Hepburn (2017) 107.

<sup>55</sup> See Broches (1972) 392. For a recent restatement of this position see *Zhinvali* [297].

<sup>56</sup> Douglas (2010) 832-835; Sasson (2017) 299-300.

<sup>57</sup> Gaillard and Banifatemi (2003) 380-381.

only the investor stands to benefit from the continued relevance of national law in investment arbitration. This is because, either directly or through ideas such as the protection of ‘legitimate expectations’, investors have succeeded in basing their treaty claims substantively (in part) on national law.<sup>58</sup>

### 3 *Applicable law provisions in investment treaties*

As treaty provisions, IIA obligations are in principle governed by international law.<sup>59</sup> Yet, IIAs sometimes contain provisions establishing a list of sources of law that must be applied for the resolution of disputes arising under them.<sup>60</sup> Some provisions require the application of the law of the state party to the dispute along with the treaty itself and international law.<sup>61</sup> Others simply demand the application of the provisions of the treaty, either alone or in conjunction with the principles or rules of international law<sup>62</sup> or the terms of special agreements concluded in relation to the investment.<sup>63</sup> The applicable law provisions, however, are usually silent on the precise role of each source in the resolution of the investment dispute and on the relationship between the different sources.

An IIA provision establishing the applicable law constitutes an agreement between the parties to the dispute, which the investor accepts when expressing its consent to arbitrate.<sup>64</sup> Respecting the terms of this agreement is the tribunal’s paramount consideration here, since ‘the parties’ agreement on applicable law forms part of their arbitration agreement’.<sup>65</sup> When the treaty provision on applicable law requires the application of both national and international law, however, the upshot will not be very different from that under Article 42(1) in the absence of agreement.<sup>66</sup> Under such a treaty provision, for example, the *Saur* tribunal referred to a principle under which each issue is

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<sup>58</sup> See Spiermann (2015) 1388 (‘in *CMS v. Argentina* the tribunal relied upon national law in deciding on key rights of the investor in relation to the investment’).

<sup>59</sup> *Reparation for Injuries*, 180.

<sup>60</sup> Banifatemi (2010) 197-198; Sasson (2017) 274.

<sup>61</sup> Schreuer (2009) 576; Voss (2011) 105. See The Netherlands-Venezuela BIT, Art 9(5).

<sup>62</sup> See France-Poland BIT, Art 8.3.

<sup>63</sup> See Gaillard and Banifatemi (2003) 377-378; Chile-Italy BIT, Art 9(5).

<sup>64</sup> Schreuer and Reinisch (2002) [146]; Sasson (2017) 274; Hepburn (2017) 106; *EDF (Annulment)* [219]; *Venezuela Holdings (Annulment)* [154].

<sup>65</sup> *MINE*, 104.

<sup>66</sup> Schreuer (2009) 581.

governed by the rule that corresponds to the issue's nature.<sup>67</sup> But as with Article 42(1) second sentence, no theory on the effect of applicable law provisions in IIAs combining national and international law seems to have found general acceptance. Here too, a 'pragmatic' approach appears to have prevailed, under which it will be 'for the Tribunal to determine whether an issue is subject to national or international law'.<sup>68</sup>

When the relevant provision requires the application of both legal systems, stating that both national and international law will be applied in accordance with each issue's nature, as specifically determined by the tribunal, is acceptable as a general matter. But this says little about the complex interaction between national and international law in investment arbitration. All investment treaty tribunals have jurisdiction over disputes arising under at least some of the treaty's substantive standards.<sup>69</sup> Even in cases where the applicable law provision does not include the host state law and jurisdiction is limited to treaty claims, 'an incidental application of domestic law is often called for'.<sup>70</sup> The issues that are generally accepted to be subject to national law in treaty claims include whether an investment was legally acquired or a contract validly concluded.<sup>71</sup> Application of national law will *a fortiori* be required either when arbitral jurisdiction covers contract/national law claims or when national law is one of the sources under the IIA's applicable law provision.

In terms of the dispute as a whole, it is the substance of the claims that determines the applicable law. When the substance is mixed, i.e., contract/treaty, national and international law are equally applicable. Here, the relationship between national and international law is one of interdependence. Both legal systems are relevant,<sup>72</sup> even if national law provisions will be discarded by the investment tribunal in case of clear conflict with any international obligation.<sup>73</sup> Regarding specific issues, in principle the law that created the right or obligation in question determines its existence, scope, and

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<sup>67</sup> *Saur* (Jurisdiction and Liability 2012) [327].

<sup>68</sup> *Venezuela Holdings* [223]. See also *Teco* [469]; *Iberdrola* (Annulment) [102]; *Oostergetel* [140].

<sup>69</sup> Investment tribunals' jurisdiction may be more extensive, covering for example 'any dispute arising from an investment'. Schreuer (2014) 24. Arguably, this language covers not only treaty disputes but also contract and national law disputes. *Ibid*, 7-8.

<sup>70</sup> *Ibid*, 17.

<sup>71</sup> Spiermann (2015) 1387.

<sup>72</sup> *Venezuela Holdings* (Annulment) [181].

<sup>73</sup> Schreuer and Reinisch (2002) [93].

interrelation with other rights and obligations within the same legal system.<sup>74</sup> National law's precise role will depend, first, on whether national law provisions extensively regulate the relevant right or obligation.<sup>75</sup> Second, on the content of the standard of treatment in question. For example, expropriation provisions in IIAs requiring respect for due process of law<sup>76</sup> include compliance with the relevant national law procedures.<sup>77</sup> And third, on whether the tribunal is dealing with jurisdiction or the substance of the dispute.

## B The role of national law before investment tribunals

### 1 *Jurisdiction*

Until recently, the conventional wisdom in investment treaty arbitration was that national law was not, at least as a general matter, applicable for jurisdictional purposes. In *CMS*, Argentina had opposed the claim on the basis of the Argentine law provision establishing the distinct and separate personality of companies vis-à-vis their shareholders.<sup>78</sup> The tribunal countered that 'the applicable jurisdictional provisions are only those of the Convention and the BIT, not those which might arise from national legislation'.<sup>79</sup> This approach was confirmed by the *ad hoc* committee, who stated: '[t]he competence of the Tribunal is governed by the terms of the instruments expressing the parties' consent to ICSID arbitration', national law being 'irrelevant in this respect'.<sup>80</sup> Several investment tribunals have followed suit, stressing the need to distinguish between the law applicable to jurisdiction and the law applicable to the merits.<sup>81</sup>

Nonetheless, a minority of investment tribunals have recognized a role for the host state's law in jurisdictional determinations.<sup>82</sup> The *Teinver* tribunal acknowledged that

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<sup>74</sup> See US Amicus in *Lone Pine* [3] (relying on Higgins).

<sup>75</sup> Ibid (national law's role in determining the scope of property rights is 'particularly true when a person voluntarily enters a heavily regulated field').

<sup>76</sup> See Energy Charter, Art 13.

<sup>77</sup> *Kardassopoulos* (Award) [394-396]; Newcombe and Paradell (2009) 376; Hepburn (2017) 46-58.

<sup>78</sup> *CMS* (Jurisdiction) [42].

<sup>79</sup> Ibid. *Obiter dictum*, the tribunal nonetheless made reference to a provision of Argentine law on the piercing of the corporate veil. Ibid.

<sup>80</sup> *CMS* (Annulment) [68].

<sup>81</sup> See *Siemens* (Jurisdiction) [31]; *MCI* (Annulment) [40]; *Daimler* [50]; *Sempra* (Jurisdiction) [27]. For jurisdictional purposes, however, the *Sempra* tribunal discussed the manner in which shareholders may exercise control over a company 'from the standpoint of corporate law'. Ibid [47-49].

<sup>82</sup> Schreuer (2009) 552.

national law may be relevant to jurisdiction.<sup>83</sup> It may not be used, however, to ‘define the basic jurisdictional requirements’, but to ‘determine whether a claimant has, as a matter of fact, satisfied the legal requirements for ICSID jurisdiction’ in the ICSID Convention and the applicable IIA.<sup>84</sup> In *Urbaser*, Argentina’s jurisdictional objections included the argument that the applicable national and international law provisions did not provide for shareholder indirect claims.<sup>85</sup> As to an applicable law provision in the relevant BIT calling for the application of the treaty itself, the host state’s law, and international law, the tribunal stated: ‘While this provision is primarily directed to the applicable law on the merits of the dispute, it may have a role to play in connection with certain specific issues to be examined concerning jurisdiction, e.g. where the operation of [certain provisions] of the BIT requires consulting of the Host State’s domestic law’.<sup>86</sup>

The application of national law to certain jurisdictional aspects of investment arbitration—often even key issues<sup>87</sup>—is persuasive. Schreuer has observed that ‘[s]ome questions that are relevant to a tribunal’s jurisdiction are governed by domestic law’, generally as a result of references to national law in the applicable IIA.<sup>88</sup> In fact, the relevance of national law to certain issues directly related to jurisdiction—including the nationality of the investor<sup>89</sup> or the legality of the investment at the time it was made<sup>90</sup>—is generally recognized.<sup>91</sup> Additionally, independently from specific IIA provisions, to the extent it involves jurisdictional questions, determination by international tribunals of the existence and scope of property rights has long been accepted.<sup>92</sup> Investment tribunals may

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<sup>83</sup> *Teinver* (Jurisdiction) [227].

<sup>84</sup> *Ibid.*

<sup>85</sup> *Urbaser* (Jurisdiction) [43].

<sup>86</sup> *Ibid* [54].

<sup>87</sup> Kjos (2013) 266.

<sup>88</sup> Schreuer (2014) 4.

<sup>89</sup> While the *Abaclat* tribunal suggested that the Argentina-Italy BIT’s applicable law provision applied to the merits, under the treaty the question of the investor’s nationality was ‘subject to the law of the Contracting State of which nationality is claimed’. *Abaclat* [285, 383]. IIAs often expressly refer to national law for purposes of determining the investor’s nationality, which in principle reflects the position under general international law. See *Soufraki* (Award) [55]; History ICSID Convention, II-1, 67.

<sup>90</sup> Schreuer (2014) 4-5.

<sup>91</sup> Whether Article 42 of the ICSID Convention is applicable to jurisdiction, regardless of whether ICSID tribunals may apply national law to jurisdictional questions under other provisions or principles, is less relevant here. See Shihata and Parra (1994) 184; *Azurix* (Jurisdiction) [48].

<sup>92</sup> See e.g. Lipstein (1945) 138.

have to decide on any of these issues at the jurisdictional phase and thus apply national law, regardless of whether the claims in question are contract or treaty claims.

The idea of the exclusive relevance of international law for jurisdictional purposes appears related to consent or, more precisely, to the instruments in which consent is contained. Since the state's consent to jurisdiction in investment arbitration is frequently contained in a treaty, only international law is applicable at the jurisdictional stage.<sup>93</sup> Yet, on the one hand, when consent to international arbitration is contained in a national law instrument, such as a foreign investment law, some consideration of national law is often inescapable. Interpretation of such an instrument applying exclusively international law rules, such as Articles 31 and 32 of the VCLT, would have no basis and may lead to incorrect results. Applying the same logic, however, international law also has a role in this case if only because international law instruments, i.e., at least the arbitral rules, have to be interpreted and applied as well.<sup>94</sup> On the other hand, even when the consent invoked is present in a treaty, several of the conditions established in IIAs to which consent is typically subject—including the investor's nationality<sup>95</sup> and the (at least initial) legality of the investment<sup>96</sup>—are subject to national law. As to these issues, consideration of national law is necessary even for the specific purpose of determining whether consent to international jurisdiction is present. Therefore, there is no reason to generally deny the relevance of national law in jurisdictional discussions before investment tribunals.

## 2 *The substance of the claims*

The application of national law to the merits of investment disputes is generally accepted. Several applicable law provisions in IIAs expressly require the application of the host state's law, including the default solution under the ICSID Convention in case of lack of agreement on the applicable law. Leaving aside the pertinence of these provisions for jurisdiction, their general applicability at the merits stage simply cannot be denied. Even as regards treaty claims and even if the provision on applicable law does not include national law, the application of the latter for certain merits issues is recognized.<sup>97</sup> In the case of investment treaty arbitration, national law is applicable in conjunction with the

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<sup>93</sup> *CMS* (Jurisdiction) [88]; *Azurix* (Jurisdiction) [50]; *Garanti Koza* [21].

<sup>94</sup> *Brandes* [81]; *Cemex* [89]; *Tidewater* (Jurisdiction) [81].

<sup>95</sup> See *Pey Casado* (Award) [260, 322].

<sup>96</sup> See *Ampal* (Jurisdiction) [301]; *Flughafen Zurich A.G.* [132].

<sup>97</sup> Schreuer (2014) 17-20.



relevant treaty and general international law. A different matter, however, is precisely what role national law plays in decisions dealing with the substance of the claims.

(a) *Rights under national law*

International tribunals have traditionally recognized a role for national law in the context of international proceedings for purposes of defining the scope of certain rights, even though national law was not included among the sources of law to be applied. In *Panevezys-Saldutiskis*, the PCIJ observed that ‘[i]n principle, the property rights and the contractual rights of individuals depend in every State on municipal law and fall therefore more particularly within the jurisdiction of municipal tribunals’.<sup>98</sup> International tribunals may have to analyse national law as an incidental or preliminary matter,<sup>99</sup> not least in order to determine ‘the nature and extent of the rights and obligations’ arising under this law.<sup>100</sup> As property and contractual rights generally have been created under a certain national law, it is this law which as an initial matter determines the characteristics of the property and rights in question.<sup>101</sup> To the extent these rights may be relevant in an international proceeding,<sup>102</sup> at least an incidental or preliminary consideration of the relevant national law is necessary.<sup>103</sup>

Some investment tribunals have adopted this reasoning.<sup>104</sup> The role of national law in defining contractual and other property rights, however, has been less straightforward and prominent<sup>105</sup> in investment arbitration—which is heavily influenced by the contract claims/treaty claims distinction—than in general international law. In *Encana*, the applicable law provision in the BIT provided for the application of the treaty

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<sup>98</sup> *Panevezys-Saldutiskis*, 18.

<sup>99</sup> *Certain German Interests (Merits)*, 42. See also *Mavrommatis (Jerusalem Concessions)*, 28-29; *Affaire des forêts du Rhodope central (fond)*, 1419; Hepburn (2017) 41.

<sup>100</sup> *German Settlers in Poland*, 29.

<sup>101</sup> Higgins observed that for the meaning of property ‘[w]e necessarily draw on municipal law sources and on general principles of law’. Higgins (1982) 270. This includes defining the ‘bundle of rights’ that attach to a certain asset. Ibid. The concept was acknowledged by the investor in *Total*. See *Total (Liability)* [34].

<sup>102</sup> When to assess a measure’s compliance with an IIA it is necessary to determine whether a national law right has been breached, this determination is in principle one pertaining to the merits. But the relevance of national law may range from determining ownership over an asset, which typically raises jurisdictional questions (see *ST-AD* [284]), to damages aspects (see *Total (Award)* [206, 216]).

<sup>103</sup> See Diehl (2012) 255 (citing the *Hoachoozo Palestine Land and Development* case of the American-Turkish Claims Commission).

<sup>104</sup> *Suez I (Liability)* [140]; *Bayview* [109-118]; *Glamis* [37].

<sup>105</sup> See also Crook (1989) 280, 286, 310 (noting the Iran-US Claims Tribunal’s ‘reluctance to apply national law’).

and international law, but made no reference to the host state's law. However, according to the tribunal

for there to have been an expropriation of an investment or return (in a situation involving legal rights or claims as distinct from the seizure of physical assets) the rights affected must exist under the law which creates them, in this case, the law of Ecuador.<sup>106</sup>

It is true, however, that national law is accorded a role here in the specific context of a claim of direct expropriation of 'legal rights or claims as distinct from the seizure of physical assets'.

The partial dissenting opinion in *Encana* advanced that the host state's law was applicable 'in connection with rights *in rem* on property or regulations regarding real property rights because of the absence of public international law substantive rules dealing with the intricacies of such matters'.<sup>107</sup> However, even though certain points in international claims had to be preliminarily decided applying national law, the investor's legal entitlement or property 'directly arising under and protected by the Treaty - and through the Treaty, by public international law - is the investor's investment and investment returns'.<sup>108</sup> The investor's protected ownership includes its legitimate expectations because of their economic value; this ownership has direct treaty protection, which does not depend on the host state's law.<sup>109</sup>

Several investment tribunals have affirmed the relevance of national law in treaty claims, not least when the claims involve contractual rights.<sup>110</sup> Further, arbitral decisions often regard the binding nature of instruments emanating from the host state in attracting the investment as a matter for determination under national law.<sup>111</sup> Douglas has referred to disputes in investment arbitration about the existence or extent of rights *in rem* said to constitute an investment, which

must be decided in accordance with the municipal law of the host state for this is not a dispute about evidence (facts) but a dispute about legal entitlements. When the issue becomes the international validity

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<sup>106</sup> *Encana* (Award) [184].

<sup>107</sup> *Encana* (Diss Op Grigera Naón) [10].

<sup>108</sup> *Ibid* [16].

<sup>109</sup> *Ibid* [20].

<sup>110</sup> *Bosh International* [113]; *Gold Reserve* [533-534].

<sup>111</sup> *SGS v Philippines* [117].

of certain acts of the host state that have prejudiced the investor's legal entitlements under municipal law, then international law applies exclusively.<sup>112</sup>

Under this conception, the definitional function of national law is necessary given that neither general international law nor IIAs contain 'substantive rules of property law'.<sup>113</sup> But while being important,<sup>114</sup> the role of national law here does not go further, since the international validity of the host state's acts is governed only by international law.

The distinction between defining the contents of certain rights and obligations, in particular under contracts, and the determination of international responsibility is common in investment tribunals' jurisprudence. The tribunal in *Azurix* noted that in a treaty claim the inquiry is 'governed by the ICSID Convention, by the BIT and by applicable international law'.<sup>115</sup> In this context, national law should help in assessing alleged breaches of a contract subject to this law, 'but it is only an element of the inquiry because of the treaty nature of the claims'.<sup>116</sup> In the jurisdictional decision, the *Total* tribunal posited that when assets and rights constitute protected investments under a BIT, any national law rights over the same assets and rights are irrelevant.<sup>117</sup> In the decision on liability, however, it asserted that national law does more than establish factual matters.<sup>118</sup> The host state's law determines the 'content and the scope of [the investor's] economic rights'.<sup>119</sup> The *El Paso* tribunal advanced that national law determines the contents of the host state's commitments and, relatedly, of the foreign investor's rights.<sup>120</sup> But 'whether a modification or cancellation of such rights, even if legally valid under [national] law, constitutes a violation of a protection guaranteed by the BIT is a matter to be decided solely on the basis of the BIT itself and the other applicable rules of international law'.<sup>121</sup>

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<sup>112</sup> Douglas (2009) 70.

<sup>113</sup> *Ibid*, 52.

<sup>114</sup> *Ibid*, 90. See also Lipstein (1945) 138; Petré (1963) 540; Amerasinghe (1964) 904; *ELSI* [94, 99].

<sup>115</sup> *Azurix* (Award) [67].

<sup>116</sup> *Ibid*.

<sup>117</sup> *Total* (Jurisdiction) [80].

<sup>118</sup> *Total* (Liability) [39].

<sup>119</sup> *Ibid*.

<sup>120</sup> *El Paso* (Award) [135].

<sup>121</sup> *Ibid*.

Investment tribunals accept that, at the merits phase, national law may have some role in the adjudication of treaty claims, not least in the definition of certain rights that are subject to this law.<sup>122</sup> This refers to the law the international tribunal applies, regardless of jurisdictional/admissibility issues relating to the role of national courts with respect to such rights. It is suggested, however, that international law—through an IIA or otherwise—may confer direct protection to certain assets or interests, independent from any consideration of national law.<sup>123</sup> From a conceptual point of view, this appears possible—whether international law provisions on property protection contain a sufficient degree of specificity to operate autonomously is a different matter. But for present purposes what is important is to what extent treaty claims whose substance relates to a breach of contract are independent from national law. The answer to this question does not depend on whether the investor claim has been characterized as a contract or treaty claim.<sup>124</sup> The real issue is whether the treaty claim, substantively, requires consideration of national law rights (including contractual rights subject to national law<sup>125</sup>). If it does, consideration of the relevant national law is required.<sup>126</sup> Moreover, the idea of independence of contract and treaty rights in dealing with the merits of investment claims becomes unsustainable.

It is argued, however, that although national law is relevant to define property rights, liability<sup>127</sup> under the IIA is exclusively governed by international law. Yet defining property rights involves not only establishing that the rights exist and resorting to national law to interpret relevant legal concepts, but also delimiting, at least preliminarily, ‘the nature and extent of the rights and obligations’<sup>128</sup> over the assets in question. If this is what national law does, strictly separating the role of national and international law

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<sup>122</sup> There is also relevant state practice to the same effect. See e.g. CAFTA-DR, Art 10.28, fn 10.

<sup>123</sup> Gaillard and Banifatemi (2003) 388 (quoting Broches’ reference to when ‘the subject matter is directly regulated by international law’). Douglas argues that consideration of national law is necessary to ascertain whether expectations protected by IIAs are legitimate. Douglas (2014) 398.

<sup>124</sup> See *Abaclat* (Diss Op, Abi-Saab) [86] (in a treaty claim the treaty ‘may define the kinds of violation, but the underlying right subject to these violations, is defined only by its legal title, and the applicable law that governs its existence’).

<sup>125</sup> See *Texaco* [22].

<sup>126</sup> Schreuer (2014) 17-18.

<sup>127</sup> The terms liability and responsibility are used interchangeably in this thesis as referring to the ‘legal relations which arise under international law by reason of the internationally wrongful act of a State’. Crawford (2013) 83.

<sup>128</sup> *German Settlers in Poland*, 29. See also Sasson (2017) 297.

becomes difficult. Of course, in investment treaty arbitration the effect of national laws on property protection must be considered together with that of the relevant IIA provisions. Further, the ‘final determination’<sup>129</sup> of investor rights over assets generally depends on the scope of the IIA’s provisions. But in the end both national and international law define the rights whose breach may give rise to liability under the IIA’s standards of protection.<sup>130</sup>

Thus, to say that IIA liability is independent from national law is generally wrong. For example, in a claim for breach of the fair and equitable treatment standard deriving from alleged breaches of contract, the tribunal may require that a serious breach or an arbitrary modification or dismantling of the contractual framework must have occurred for there to be a treaty breach. But any of these more serious violations of the contractual framework may not be found without also concluding that there have been one or more ‘mere’ contract breaches. Further, in the case of certain rights the role of national law in treaty claims may be extensive. IIAs often include intellectual property rights among protected investments,<sup>131</sup> but without otherwise establishing their contents. In national law, these rights typically involve detailed regulations defining their precise scope, conditions, temporal limits, etc. National regulations are important in determining not only the right’s existence,<sup>132</sup> scope, and who owns it, but also the purposes of the legislation that created it. For example, whether the acts affecting intellectual property rights sought to guarantee access to a vital medicine at low prices. This may in turn bear on the measure’s fairness and thus on its validity under an IIA.

(b) *Breaches of national law*

Findings of breaches of national law are not infrequent in investment treaty arbitration. They may occur as part of the reasoning leading to a decision on the alleged treaty breaches or figure among the ultimate findings on liability together with the conclusions on treaty claims. Regarding the first possibility in *Enron*, although the *dispositif* contains findings exclusively on treaty breach,<sup>133</sup> as part of the analysis of the contested measures

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<sup>129</sup> *Encana* (Diss Op Grigera Naón) [10].

<sup>130</sup> See *Philip Morris v Uruguay* (Award) [271].

<sup>131</sup> See e.g. FTA Chile-US, Art 10.27.

<sup>132</sup> See CETA, Art 8.1 (conditioning coverage of certain intellectual property rights on whether ‘such rights are provided by a Party’s law’). See also *Philip Morris v Uruguay* (Award), [243-274].

<sup>133</sup> *Enron* (Award), 138.

the award analysed the claims ‘purely’ under Argentine law. Argentina had breached its obligations under a public utility licence and this was significant because the licence was subject to Argentine law in some key respects, without prejudice to the effect that these legal arrangements [had] under the Treaty and international law. Liability [was] thus the consequence of such breach and there [was] no legal excuse under the Argentine legislation which could justify the non-compliance, as the very conditions set out by this legislation and the decisions of courts [had] not been met.<sup>134</sup>

The tribunal in *Oxy II* adopted findings of breach of Ecuadorian law together with its findings on treaty violations in the dispositive part of the award.<sup>135</sup>

An incidental finding of breach of national law as part of a tribunal’s ratio appears unproblematic, even in the context of a treaty claim and even if national law is not expressly included among the sources of law to be applied. Even if a tribunal has no jurisdiction over breaches of national law and the applicable law is restricted to international law, consideration of national law issues, including potential breaches, may be necessary. In particular, when the treaty claim somehow involves rights created by national law.<sup>136</sup> However, a tribunal would exceed its powers if it were to include breaches of national law among its ultimate liability findings when its jurisdiction is limited to treaty claims, regardless of whether national law forms part of the applicable law.<sup>137</sup> Jurisdiction may be limited to treaty claims as a result either of the provisions of the IIA granting jurisdiction or of the terms in which the claim has been presented by the claimant and jurisdiction affirmed by the tribunal.<sup>138</sup> A finding of breach of contract or national law in the dispositive part of the award when the investment tribunal has jurisdiction over contractual or national law disputes or generally over ‘investment disputes’ (or similarly broadly worded jurisdiction provisions) is unobjectionable.

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<sup>134</sup> Ibid.

<sup>135</sup> *Oxy II* (Award) [876].

<sup>136</sup> Schreuer (2014) 17.

<sup>137</sup> This is because an applicable law provision does not expand the arbitral tribunal’s jurisdiction, generally defined elsewhere in the IIA. *Servier* [511].

<sup>138</sup> Claimants in investment arbitration frequently frame their claims exclusively as treaty claims, even if the jurisdiction provision covers both contract and treaty claims. The reason is often to avoid the effect of contractual forum selection provisions. Yet the law applicable to treaty claims is more a function of the IIA provisions bearing on the applicable law and of the substance of the claim than of the claimant’s prayer for relief. But see Ho Qing Ying (2014) 59.

## C The law applicable to the admissibility of shareholder treaty claims

Applicable law in investment arbitration includes international and national law as formal sources.<sup>139</sup> The reasons for this include the terms of relevant provisions in IIAs and arbitral rules, surveyed above, the requirement that an investment be made in the territory of one of the IIA states parties for protection to be triggered, and the typical contents of investment claims involving national law elements.<sup>140</sup> For similar reasons, and because their substance overlaps with related non-treaty claims, shareholder indirect claims' admissibility may be assessed considering grounds relating to national and international law provisions and proceedings.<sup>141</sup>

As discussed in Chapter 2, the difference between jurisdiction and admissibility is not always a bright-line distinction yet it is well-recognized in international adjudication. Jurisdiction is concerned with consent and the instruments said to contain such consent. In investment treaty arbitration, jurisdiction depends on the IIA provisions related to state consent to arbitration. However, as noted above, not only the IIA but also general international law and national law are relevant to jurisdictional determinations. This applies *a fortiori* to admissibility. The ICJ refers to admissibility as a 'legal reason'<sup>142</sup> or even more generally to 'reasons'<sup>143</sup> why it should decline to determine the merits of a claim. These concepts are broad enough to cover grounds stemming from any provision of the applicable law, as well as from circumstances such as, for example, the effect of parallel proceedings or of 'the agreement of the parties to use another method of pacific settlement'.<sup>144</sup>

In particular regarding shareholder claims, the suggestion that jurisdiction and admissibility determinations concerning the corporate personality should only be based on international law provisions<sup>145</sup> is erroneous. Here, consideration of 'legal reasons'

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<sup>139</sup> Grisel (2014) 233.

<sup>140</sup> See Witenberg (1932) 6. That international tribunals may have to apply national law along with international law is not revolutionary. What is less common in international law, however, are the functions that national law may perform in investment disputes. For example, national law may have an 'important contributory role', albeit not 'outcome-determinative', in determinations of breach of the fair and equitable treatment standard. Hepburn (2017) 13-40. See also Montt (2012) 154.

<sup>141</sup> See Chapter 2 on proposed admissibility criteria.

<sup>142</sup> *Application Genocide Convention II* [120]; *Nicaragua v Colombia* (2016) [48].

<sup>143</sup> *Oil Platforms* (Merits) [29].

<sup>144</sup> See *Application Genocide Convention II* [120].

<sup>145</sup> *CMS* (Jurisdiction) [42]; *Enron I* (Jurisdiction) [38].

deriving from international law in admissibility decisions is uncontroversial.<sup>146</sup> Yet, even leaving aside the effect of IIA provisions referring to national law, there is no reason in international investment law to depart from the position under general international law, i.e., that in corporate matters ‘international law looks to the rules of the relevant domestic law’.<sup>147</sup> Companies are incorporated under a certain national law,<sup>148</sup> which regulates aspects that are generally not governed by international law (or by IIAs, for that matter).<sup>149</sup> National law is relevant to determine whether shareholder rights have been infringed under general international law.<sup>150</sup> The same applies to the admissibility of shareholder IIA claims—in particular, given the peculiarities of the applicable law in this field—at least unless the IIA provides otherwise.

Relevant admissibility considerations may also relate to provisions of a contract to which the company is a party and yet forms part of the basis of a shareholder indirect claim under an IIA. In *Poštová Banka*, the tribunal observed that the shareholder claimant had no ‘legal or contractual right’, under national or international law, to the company’s assets and could thus not bring a treaty claim ‘on the basis of an alleged impairment of such [assets]’.<sup>151</sup> This joint analysis of national, contractual and international law rights, conducted exclusively for jurisdictional purposes,<sup>152</sup> is also applicable to admissibility.<sup>153</sup> The tribunal in *Hochtief* found inadmissible a treaty claim relying on a contractual provision.<sup>154</sup> There was ‘no legal reason why effect should not be given to an agreement between an investor and a host State either to limit the rights of the investor or to oblige the investor not to pursue any remedies, including its BIT remedies, in certain circumstances’.<sup>155</sup>

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<sup>146</sup> Douglas (2009) 74-77.

<sup>147</sup> *Diallo* (Jurisdiction), 605. See also *Diallo* (Merits), 675, 689; *Barcelona Traction* (Second Phase), 33-34; *RREEF* [143].

<sup>148</sup> See *Yukos* (Jurisdiction) [76].

<sup>149</sup> *Perenco* [520].

<sup>150</sup> *Diallo* (Jurisdiction), 606; *Diallo* (Merits), 675; Lowe (2010) 1012-1013.

<sup>151</sup> *Poštová Banka* [230].

<sup>152</sup> See also *RREEF* [145].

<sup>153</sup> The necessary application of national and international law as to companies does not exclude that both legal systems may diverge on background principles. See *Perenco* [522].

<sup>154</sup> See Chapter 1.

<sup>155</sup> *Hochtief* (Liability) [191].



It has been argued that treaty claims and rights exist on the international plane and thus provisions of national law cannot limit their scope.<sup>156</sup> However, shareholder IIA claims and rights involve contractual/national law as well as international law aspects.<sup>157</sup> Their legal basis is thus mixed and, as discussed above, the effect of IIA provisions bearing on the applicable law is also a combination of national and international sources. A finding of inadmissibility based on the criteria discussed in Chapter 2 may involve an application of national and international law elements. But if investment tribunals exercise their inherent power to find certain shareholder indirect claims inadmissible, when necessary to avoid impinging on rights or principles recognized by the applicable law, there is no conflict with international law. The annulment committee in *Venezuela Holdings* considered a contractual agreement and a decision by the Venezuelan legislature and whether these provisions could limit the compensation due under the applicable IIA.<sup>158</sup> The committee, while stressing that national law ‘may not be invoked to avoid international obligations’,<sup>159</sup> also noted that to determine that the relevant national provisions

[did] not displace Venezuela’s international obligations [was] not at all synonymous with determining that they [had] no relevance for the ascertainment of the content and consequences of those obligations.<sup>160</sup>

The admissibility of shareholder indirect claims must be assessed applying the combination of laws referred to above.<sup>161</sup> In certain circumstances, they may be found inadmissible precisely to enforce provisions of the different sources of the applicable law in investment arbitration. For instance, national and international provisions protecting the rights of persons not involved in the IIA claim.

## II. CONCLUSION

The investment treaty regime has been characterized as ‘hybrid’, in that it involves treaties between states governed by public international law and private beneficiaries

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<sup>156</sup> McLachlan (2008) 389; Bentolila (2010) 97, 104-105.

<sup>157</sup> See Chapters 4 and 6; Sinclair (2013) 229.

<sup>158</sup> *Venezuela Holdings* (Annulment) [139-157].

<sup>159</sup> *Ibid* [161].

<sup>160</sup> *Ibid* [180]. See also *Burlington* [215-217]; *WNC* [336].

<sup>161</sup> See Hepburn (2017) 85 (liability and damages in investment arbitration are governed by a mix of domestic and international law).

often in the form of a corporate entity constituted under a national law.<sup>162</sup> The cause of action in investment arbitration may also be described as hybrid, in the sense that it combines national and international law elements even when its ‘fundamental basis’ is a treaty. This is particularly the case with shareholder indirect claims, which by definition refer to measures harming the company’s assets. The national legal regimes to which these assets are subject are relevant in treaty claims, for jurisdictional, admissibility, and merits purposes.

The reasons for this necessary application of national law, alongside relevant provisions of the IIA and general international law, relate not only to shareholder claims’ and rights’ mixed character, but also to the provisions bearing on the applicable law in investment arbitration. In *Yukos*, the tribunal affirmed that national law should not control the contents of international obligations.<sup>163</sup> This conclusion derived from the separation between national and international law.<sup>164</sup> Yet whenever an IIA provision incorporates national law to the treaty regime, it is incorrect to suggest that national law controls the international obligation’s content. Rather, it is a ‘title of international law’<sup>165</sup> that confers certain effects on national law. Absent a clear conflict, discarding the relevance of national law based on ideas of the primacy or separation of international law fails—with no good reason—to address the complexities/equities of claims that are substantively based on both national and international law.

Admissibility concerns reasons for a tribunal not to decide the merits. The relevant reasons here derive from the effects of substantive overlaps between shareholder IIA claims and related national law claims. International law and sometimes the IIAs themselves contain pertinent rules, such as those seeking to prevent double recovery. Other reasons may be recognized both by national and international law provisions. For example, investment tribunals have recently applied the concept of abuse of process vis-à-vis different treaty claims involving the same damages.<sup>166</sup> The same approach may be

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<sup>162</sup> Douglas (2004) 152.

<sup>163</sup> *Yukos* (Jurisdiction) [315].

<sup>164</sup> *Ibid* [316].

<sup>165</sup> *Certain German Interests* (Merits), 31.

<sup>166</sup> *Ampal* (Jurisdiction) [327-339]; *Orascom* [539-545].

adopted in respect of parallel shareholder treaty claims and national proceedings, particularly when the applicable national law recognizes similar principles.<sup>167</sup>

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<sup>167</sup> See *Vodafone*, 9 (filing separate treaty proceedings by companies of the same corporate group ‘amounts to abuse of process of law [under Indian law]’).

## 8 Conclusion

This thesis focused on two foundational ideas of the modern international law of foreign investment, i.e., shareholders' standing to claim for harm to the company's assets and the contract/treaty claims distinction. These two ideas advance interrelated notions of independence: (i) independence of shareholder treaty rights in respect of the local company's contractual/national law rights, and (ii) independence of treaty claims in respect of contract/national law claims. Investment arbitration's quest for independence, not least vis-à-vis national law and institutions, has come at a cost however.

The thesis' argument is twofold. First, because investment tribunals uncritically endorse shareholder standing in indirect claims and the distinctiveness of treaty claims, they have overlooked substantive overlaps between contract and treaty claims. Decisions contributing to this outcome have often dealt with jurisdictional objections. However, tribunals have not revisited the 'separation' between contract and treaty claims when resolving the merits of investment disputes. For strictly jurisdictional purposes, mainstream ideas on shareholder standing and the cause of action may, depending on the terms of the applicable IIA, be apt given: (i) the need to decide on jurisdiction generally before hearing the merits (through *prima facie* tests or the like); (ii) investment tribunals' duty to exercise jurisdiction whenever all jurisdictional requirements are present; and (iii) the short list of conditions to which investment tribunals' jurisdiction is typically subject under IIAs. When dealing with the substance of the claims, however, the failure to recognize overlaps between related national and international law claims is problematic. This thesis has demonstrated that it results in investment tribunals neglecting to deal with risks of multiple recovery and prejudice to third parties' legitimate interests and to adequately consider all the sources of law in investment disputes.

Second, substantive overlaps between shareholder treaty claims and related contract/national law claims and the referred to ensuing risks potentially affect the admissibility of shareholder claims. Relevant admissibility considerations include (i) the extent to which damages claimed in the shareholder treaty claim coincide with those that may be claimed before a non-treaty forum; (ii) whether both the shareholder and the company may effectively claim for the damages in question; (iii) whether the shareholder or the company has filed non-IIA claims before commencing the investment arbitration; (iv) whether the IIA claims rely on a contract with a forum selection clause providing for

a jurisdiction different from the treaty tribunal; (v) whether the investment tribunal can adopt measures to effectively address risks connected to substantive overlaps; (vi) whether third parties, such as the company's creditors, may be affected by the shareholder IIA claim; and (vii) whether non-IIA claims involving the same damages as the shareholder IIA claim have been waived or settled.

However, none of these factors is, by itself, an absolute bar to admissibility. Rather, they are relevant considerations in an overall assessment of shareholder indirect claims' admissibility. Given the specificities of IIA provisions bearing on the applicable law and the substantive coincidence of treaty and contract claims, the admissibility assessment requires an integrated approach to the sources of law in investment arbitration, where proper weight is given not only to the IIA provisions but also to general international law and national law.

This thesis was divided into eight chapters. Chapter 1 introduced the problem of substantive overlaps between treaty and contract claims, demonstrating that the problem is compounded by ideas of independence of shareholder IIA rights and claims. This chapter also identified the two main problems deriving from the parallelism between shareholder indirect claims under IIAs and non-IIA claims, viz. risks of multiple recovery and prejudice to third parties. It demonstrated that admissibility constitutes an adequate approach to these problems, notwithstanding other (mostly complementary) alternatives, which were also discussed.

Chapter 2 adopted a definition of admissibility. It also distinguished the concept from jurisdiction and the merits, demonstrating that the three concepts are often intertwined but are different. This Chapter also advanced criteria to assess the admissibility of shareholder indirect claims, considering the problems referred to above.

Chapter 3 discussed some of the main antecedents of the relevant ideas of standing, cause of action, and damages, mainly through the decisions of the 1903 Venezuelan Commissions and the 1923-1934 Mexican Commissions. These Commissions functioned in a context that differed in important respects from that of investment tribunals. The differences include the institutional and procedural arrangements and the position on background notions of international law such as the status of non-state actors. Yet their decisions hold lessons for admissibility determinations in modern investment disputes. These include the need to acknowledge overlaps between

international and non-international claims and be alert to the consequences of such overlaps, and to give proper weight to national law.

Chapter 4 analysed the position of shareholder claims. Both general international law and international investment law protect shareholder rights, although IIAs have strengthened and expanded the protection. Investment tribunals have unanimously asserted jurisdiction over shareholder claims relating to measures taken against the company's assets. But even if involving the exercise of an independent right of action under international law, the thesis argued that such shareholder indirect claims overlap substantively with claims of the company. Complementing IIA provisions, general international law and national law principles bearing on the interrelation between shareholder and company rights need to be considered in dealing with the consequences of such overlaps.

Chapter 5 focused on damages. The analysis revealed that, notwithstanding differences in valuation methodologies, the damage involved in shareholder indirect claims is the harm suffered by the local company. Investment tribunals allow any entity that forms part of the same corporate structure as the local company to claim this damage. The only requirement is that the claiming entity be protected by an IIA, no matter how many intermediary entities there are between the claimant and the company that suffered the damage. Yet this thesis argued that there may be reasons to accord priority to the local company (or to another entity within the corporate structure) for recovery purposes, including multiple recovery risks and prejudice to legitimate third-party interests. Investment tribunals should take these reasons into account when exercising their discretion to assess damages.

Chapter 6 examined the contract claims/treaty claims distinction and its impact on investment tribunals' decisions. The analysis of the causes of action in IIA claims revealed considerable substantive overlaps between treaty claims involving underlying contractual relationships and contract claims. This required revisiting certain mainstream notions of independence of treaty claims and rights vis-à-vis contractual claims and rights. The conclusion was that the contract/treaty distinction and its main component, i.e., the 'fundamental basis of the claim' concept, are useful, perhaps even necessary, tools for jurisdictional purposes. However, the mechanical application of the distinction beyond jurisdictional determinations has prevented consideration of the substantive links between

contract and treaty claims. Substantive overlaps must be acknowledged and their consequences analysed as potentially affecting the admissibility of claims.

Chapter 7 examined the law applicable to investment claims. It posited the application of national law and general international law, along with the provisions of the relevant treaty, in all phases of investment treaty arbitrations and particularly to admissibility determinations of shareholder indirect claims. These claims involve elements of national and contract law. If such elements are isolated from their proper legal background, the upshot is an inadequate consideration of the applicable law. Conversely, national and international sources of law may contain relevant provisions to address risks generated by shareholder indirect claims.

The overall purpose of this thesis was at the same time more modest and more ambitious than the important goal of coordinating parallel proceedings. It was more modest in that effective coordination ultimately depends on an evolution of international investment law's architecture, where investment tribunals would operate under some kind of unified institutional framework, or at least on the adoption and application of procedural devices such as claim consolidation. An admissibility approach provides less definite responses to the complexities caused by overlapping claims and relies more on the responses of individual tribunals.

Yet admissibility includes notions of fundamental importance, involving the very purpose and limits of the judicial function.<sup>1</sup> Shareholder treaty claims that overlap with contract claims often raise problems that investment tribunals, under their 'overriding legal and moral task of seeking the truth and dispensing justice according to law',<sup>2</sup> seriously cannot ignore. The contribution of this thesis is, first, to acknowledge the existence of the problem and identify its causes. Second, to propose a solution that entails abandoning the idea of independence of treaty claims and embracing the tools that international and national law provide to deal with competing entitlements over the same rights. The goal is that international investment law, while delivering on the promise of investment protection, does not hurt the legitimate interests of those who are not its direct beneficiaries and ultimately the interests of justice.

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<sup>1</sup> Brownlie (1995) 113.

<sup>2</sup> *Conoco (Reconsideration)* (Diss Op, Abi-Saab) [66].

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